UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of	)	
Frank Acierno,	)	**Docket No. CWA-03-2005-0376**
Christiana Town Center, LLC and	)	
CTC Phase II, LLC	)	
Respondents	)	

ORDER ON MOTIONS

The origin and background of this proceeding under Section 309(g) of the Clean Water Act ("CWA" or "the Act"), 33 U.S.C. § 1309(g), has been set forth in prior Orders, i.e., Order Denying Motion to Dismiss and to Suppress and Granting Motion for Leave to Amend Complaint, dated June 30, 2006; Order Denying Complainant's Motion For Default Order, dated December 13, 2006; Order Granting in Part and Denying in Part Complainant's Motion to Strike, dated February 28, 2007; Order [directing the parties to file prehearing exchanges], dated March 6, 2007; and Order Denying Respondents' Motion for Partial Reconsideration, dated April 5, 2007.

Presently pending are the following motions:

1.) Complainant's Motion for Discovery and Motion *in Limine*, dated April 20, 2007;
2.) Respondents' Motion to Dismiss;
3.) Respondents' Motion for a *Franks* Hearing;
4.) Respondents' Motion for Discovery by Interrogatories and Document Requests;
5.) Respondents' Requests for Admissions and Agency Records; and
6.) Respondents' Motion for Depositions Upon Oral Questions.

These motions will be considered seriatim.

1. Complainant's Motion for Discovery

Complainant requests that the ALJ grant its Motion for Discovery and Motion *in Limine* and order Respondents to respond to the attached interrogatories and produce the materials called for by the Requests for Documents (Discovery Motion at 1). Further, Complainant asks the ALJ to bar Respondents from introducing such information if they fail to comply with the Discovery Motion. Complainant notes that this Motion was filed because of the April 20th filing deadline for motions other than for subpoenas imposed by the ALJ and, therefore, may be incomplete because Respondents did not file their exhibits with their prehearing exchange (Discovery

Memorandum ("Memorandum") at 1-2). Therefore, Complainant reserves the right to request additional discovery or modify the current discovery request after reviewing Respondents' exhibits.

Complainant alleges that Respondents' storm water discharges at the Christiana Town Center to waters of the United States violated a permit issued by the Delaware Department of Natural Resources and Environmental Control ("DNREC") as well as Sections 301 and 402(p) of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1311 and 1342(p). According to Complainant, Respondents' violations included not stabilizing the Site and not submitting Certified Construction Reviewer ("CCR") Reports. As indicated infra, failure to submit CCR Reports is not specifically alleged as a violation in the Amended Complaint, which is the basis in part for Respondents' contention that the reports are not relevant. In addition, it is alleged that Respondent CTC Phase II, LLC ("CTC") did not obtain NPDES Permit coverage for the discharges from its portion of the Site as required by Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1301 and 1342. Complainant asserts that the interrogatories and document requests that are the subject of its Discovery Motion would have probative value in proving these violations (Discovery Memorandum at 2).

Complainant points out that in order for its Discovery Motion to be granted, the discovery request must meet three criteria: 1) the discovery must not unreasonably delay the proceeding or unreasonably burden the non-moving party; 2) the discovery must seek information most reasonably obtained from the non-moving party and which the non-moving party has refused to voluntarily provide; and 3) the discovery seeks information with significant probative value on a disputed issue of material fact (40 C.F.R. § 22.19(e)(1)).[1] Although Complainant recognizes that the standards for discovery under Consolidated Rule 22.19 are more restrictive than under the Federal Rules of Civil Procedure (*Motiva Enterprises, LLC*, Docket No. RCRA-03-2000-0004 (ALJ August 17, 2001)), but nevertheless argues that its Discovery Motion is justified (id. at 3). Complainant alleges that all the information subject to the Discovery Motion was refused by Respondents on several occasions by either refusing to provide the information or not responding to Complainant's requests.[2]

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[1] Memorandum at 3. Consolidated Rule 22.19(e) provides for motions for discovery. Rule 22.19(e) specifically states that the motion must "specify the method of discovery sought, provide the proposed discovery instruments, and describe in detail the nature of the information and/or documents sought." (40 C.F.R. § 22.19(e)). Discovery motions will only be granted if the ALJ determines that the motion:

> (i) Will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party;
> (ii) Seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and
> (iii) Seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought.

[2] For this assertion, Respondent relies on Motion Exhibits 5 and 6. Exhibit 5 is Respondents' Objections and Responses ("Objections"), dated May 30, 2006, to an EPA Section 308 Information Request. Exhibit 6 is an e-mail, dated September 26, 2006, from Respondents' counsel to counsel for Complainant and a letter of the same date from Complainant's counsel to counsel for Respondents explaining the restrictive nature of the Part 22 Consolidated Rules with respect to discovery.

Respondents filed a Response and Memorandum to Complainant's Motion for Discovery and Motion *in Limine* on May 15, 2007 ("Discovery Response" and "Response Memorandum"). On May 24, 2007, Complainant filed its Reply ("Discovery Reply").

Interrogatory No. 1 and Document Request No. 1

Interrogatory No. 1 requests information as to Mr. Acierno's role with Respondent CTC Phase II, LLC and a list of all contracts and agreements that CTC had for work at the Site during the relevant period.[3] Document Request No. 1 asks for all correspondence between CTC and either the State of Delaware or New Castle County with respect to the Site during the relevant period (id.). According to Complainant, this information has significant probative value because Respondents admitted in their Answer that CTC, as owner of part of the Site, was responsible for the acts and omissions that occurred on the part of the Site that it owned, instead of Respondent Acierno. This information allegedly would demonstrate to what extent CTC was responsible for development of its portion of the Site and thus liable for the violations thereon. Additionally, the evidence would demonstrate Respondent Acierno's control of the Site as owner or operator and thus tend to show his liability for the violations as compared with Respondent CTC. Complainant also alleges that the response to the interrogatory should be easy to prepare and the documents should be easy to produce because Respondent CTC has only existed for a relatively short period of time (id.). Moreover, Complainant says that Respondents should have the documents [correspondence concerning the Site with the State or County] in a central location while documents in State or County files would likely be in scattered locations (id. at 5). Complainant says this information was requested by letters to Respondents' counsel, dated March 27, 2006 and September 26, 2006 (Motion Exhibits 2 and 3) but that Respondents did not provide the information or meet the request (Motion Exhibits 5 and 6).

Respondents incorporate by reference their May 30, 2006 Objections and Responses to the EPA's Request for Information and Production of Documents ("Objections") (Response Memorandum at ¶ 2). The Objections as applied here are to the effect, inter alia, that information sought by Interrogatory No.1 and Document Request No. 1 is not relevant nor are these requests reasonably calculated to lead to the discovery of admissible evidence. Respondents further state that any actions taken by Respondent Acierno with respect to the Site were done in his capacity as a managing member of the limited liability company, rather than in his personal capacity. Moreover, Respondents assert that ownership of the various parcels is a matter of public record for Complainant to obtain and "have also been disclosed and produced in prior communications and filings in this action" (Id.). Respondents point out that the Amended Complaint does not allege violations due to a failure to prepare CCR Reports, and state that the Reports are irrelevant (id.). Respondents say that once the Site was stabilized by a fully implemented E&S Plan (which was allegedly accomplished) by October of 2003, there was no obligation to perform CCR inspections thereafter. Finally, Respondents state that "[w]ithout

[3] Discovery Memorandum at 4. It should be noted that "CTC" as used in Complainant's Discovery Memorandum refers to CTC Phase II, LLC, while "CTC or Site " is defined in the Interrogatories and Request for Documents as the Christina Town Center as shown on the Erosion and Sediment Control Plan ("E&S Plan"), Application No. 2000-1453, approved by the New Castle County Department of Land Use on April 24, 2002 (Exhibit 6 to Complainant's Reply to Portions of Respondents' Answer Captioned as "Motions"). It includes the property identified on the E&S Plan as "Lands Formerly of Lawrence Goldstein" and it includes any portion that is fully or partially developed or remains to be developed. The "relevant period" means from April 24, 2002, to November 1, 2004.

waiving their objection, any responsive documents Respondents intended to rely on will be produced." (Id.).

In its Reply to Respondents' Response to Complainant's Motion for Discovery and Motion *in Limine*, Complainant points out that Respondents have taken an inconsistent stance as to the probative value of information and documents Complainant has asked for in discovery. Complainant says that Respondents would deny in discovery the same type of evidence they seek to use at hearing. Complainant emphasizes that information sought in Interrogatory No. 1 and Document Request No. 1 relates to the roles Respondents CTC Phase II, LLC [and Acierno] took with respect to construction activities at the Site and is neither moot nor irrelevant (Discovery Reply at 2).

Discussion

Respondents' assertion that any action taken by Acierno with respect to the Site was done in his capacity as a managing member of a limited liability company rather than in his personal capacity is a matter for evidence at a hearing and hence, a discoverable fact. It is noted that the initial Answer filed by Respondents admitted Paragraph 4 of the Complaint which alleged that Respondent Acierno is the owner of Christiana Town Center, LLC. *See also* Respondents' Objections and Responses to EPA's Request for Information and Request for the Production of Documents (supra note 1), Response to Question 2. With respect to Christiana Town Center, LLC for the relevant period, provide, inter alia, the names of all officers and directors of the Company, Response: "Frank E. Acierno. Sole Member of the Delaware Limited Liability Company known as Christiana Town Center, LLC." Moreover, as pointed out in the Order Denying Motions to Dismiss and to Suppress and Granting Motion for Leave to Amend Complaint, dated June 30, 2006 ("June Order"), Acierno could be held liable, if he were shown to be the one in control and making decisions with regard to the Site (id. at 15).

Respondents' contention that ownership of various parcels comprising the Site is a matter of public record for Complainant to obtain is rejected. Paragraph 13 of the Amended Complaint alleges that according to a deed, dated December 12, 2002, Respondent Acierno owned the undeveloped portion of the Site from April 21, 2001, until December 12, 2002. In their Answer, Respondents asserted that the deed is incorrect. Conveyances relied upon by Respondents to support the contention that neither Acierno nor Christiana owned the Site at relevant times are discussed in the June Order (id. 12-13). Moreover, Respondents have made other conflicting statements as to ownership of parcels comprising the Site (Complainant's Response to Prehearing Item 13, Prehearing Narrative at 17). Respondents are in possession of information which will eliminate doubts or confusion as to ownership of the Site and can most reasonably provide it. It follows that Respondents' Objections to Complainant's Motion are lacking in merit and that Respondents will be ordered to provide the information requested in Interrogatory No. 1 and the documents requested in Document Request No. 1.

Interrogatory No. 2 and Document Request No. 2

Interrogatory No. 2 asks Respondent to list all other properties in Pennsylvania, Virginia, and North Carolina where they or any company they managed or directed have engaged in land disturbing activities, including construction activities, since October 1, 1994 (Discovery Memorandum at 5). Additionally, Complainant asked for information concerning State or National Pollutant Discharge Elimination System Permit coverage sought or obtained for these

other sites. Complainant says that this information could lead to information concerning [CWA] compliance at the other sites and points out that the Act (§ 309(g)(3)) specifically lists " any prior history of such violations" as a factor for consideration in assessing a penalty.

Document Request No. 2 requests four missing CCR Reports for inspections which took place on June 21, 2002, August 21, 2002, November 22, 2002, and December 27, 2002 (Discovery Memorandum at 8). Complainant says that it has four CCR Reports which refer to the missing reports. Complainant states that the CCR Reports could be significant because they could provide information about compliance with E&S Plans from a source hired by Respondents, rather than from a source allegedly engaged in "malicious prosecution" against Respondents. According to Complainant, Respondents or contractors under their control are the most reasonable source for the reports, because it has checked with New Castle County and the County does not have the reports (id.). Complainant says that it requested the reports in letters to Respondents' counsel dated March 27, 2006, and November 29, 2006 (Motion Exhibits 2 and 4) but that Respondents refused to comply (Motion Exhibits 5 and 6).

Respondents object to Document Request No. 2 upon the ground, inter alia, that the CCR Reports are of little probative value because they do not in and of themselves constitute proof of whether a site is in violation of the regulations (Response at 4). Indeed, Respondents assert that the Reports only provide a snapshot in time regarding progression of site work over weeks and months where sites have numerous technical issues arising as a result of storm events, heavy equipment traffic and earth moving activities. Additionally, Respondents say that the Reports only show whether work was going on a particular day and are recommendations rather than requirements (id. 5). Respondents contend that any information as to violations at other sites would not be admissible at hearing and assert that Complainant is presumptuous in asking for such information, because there are no reasonable grounds to believe there have ever been prior violations or that EPA will ultimately be entitled to one dime in penalties in this proceeding (Response Memorandum at ¶ 3).

Complainant says that evidence of violations at other facilities is relevant and admissible in a Clean Water Act penalty hearing (Discovery Reply at 3, citing *Public Interest Research Group of New Jersey v. Hercules Inc*., 830 F. Supp. 1525, 1544-45 (D.N.J. 1993), *aff'd in part, rev'd in part*, 50 F.3d 1239 (3d Cir. 1995)).

Discussion

Complainant is correct that evidence of violations at other sites is admissible evidence in a CWA civil penalty hearing and this is true regardless of whether the penalties are imposed by a court in accordance with Section 309(d), under the phraseology "any history of such violations", or administratively in accordance with Section 309(g)(3), "any prior history of such violations". See, e.g., *In re Donald Cutler*, CWA Appeal No 03-01, 11 E.A.D.622, 665 (EAB, September 2, 2004) at 642 et seq.

Complainant has asked that Respondents be ordered to list the other sites in North Carolina, Virginia and Pennsylvania in which Respondents, or any company managed or directed by them, has engaged in land disturbing activities, including construction activities, since October 1, 1994, and to indicate whether NPDES permit coverage was sought or obtained for these sites. Complainant says that these sites were referred to in the deposition testimony of Frank Acierno in an action styled *Acierno v. Goldstein & Lipsley [Lipsy]*, Civil Action No. 20056-NC and has asked for the information beginning October 1, 1994 (letter from Philip

Yeany to Richard Abbott, dated November 29, 2006, Motion Exhibit 4). The significance and reason for asking for the information as far back as October 1, 1994, is not explained in either the Motion for Discovery or the Memorandum in support thereof.

While it is well settled that the time-honored cry of "fishing expedition" will not prevent an inquiry into the factual basis of an opponent's case, *Hickman v. Taylor*, 329 U.S. 495 (1947), the simple fact is that there are permissible and impermissible fishing expeditions. Complainant's request here is analogous to a respondent alleging selective enforcement as a defense to a penalty claim and then in a fishing expedition seeking discovery for evidence to support the defense. For discovery to be allowed under such circumstances, a preliminary showing of the essential elements of the selective prosecution defense must first be made. *United States v. Catlett*, 584 F.2d 864, 865 (8th Cir 1978) and cases cited. This preliminary showing must include proof (1) that the government singled out a violator ["Respondent"] while other similarly situated violators were left untouched [i.e., no enforcement action was taken] and (2) the selection was based on impermissible considerations such as race, religion, or the desire to prevent the exercise of constitutional rights. While the selective prosecution rule is based in part on the presumption that government officials will do their duty, it is not a stretch to apply that presumption, similar to the presumption of innocence in criminal cases, to a developer's or contractor's compliance with storm water regulations. Here, for all that appears, Complainant is simply assuming that Respondents violated storm water regulations at the other sites the existence of which it is not aware and seeks discovery to support that assumption.[4] Interrogatory No. 2 will be denied.

Respondents' objections to providing the CCR Reports requested by Complainant are lacking in merit and warrant little discussion. It is clear that CCR Reports are required by the Storm Water Regulations for projects of 50 acres or more (June Order at 2, note 2). Moreover, the "E&S Plan" approved by the NCCDLU on April 24, 2002 (supra, note 2), provides that "A Certified Construction Reviewer (CCR) Will Conduct On-Site Review Of This Plan On A Weekly Basis. A Written Report Of This Review Will Be Delivered To The New Castle County Department Of Land Use (NCCDLU) within 24 Hours of Being Sealed" (Erosion And Sediment Control Notes, Paragraph 10). Additionally, Paragraph 7 of the E&S Notes states "All Disturbed Soil Surfaces, Including Stock Piles and Perimeter Controls Are Subject To Erosion And Shall Be Stabilized Either Temporarily Or Permanently Within Fourteen (14) Calendar Days." It is therefore clear that the CCR Reports are intended to and do reflect conditions at the Site as of the date of the Reports and are relevant evidence on that issue. As Complainant points out, Respondents have relied on the reports to support the contention that the Site was in full compliance with State and County law as of October, 2003.[5] It simply cannot be that the

[4] Complainant is unlikely to acknowledge that the storm water regulations are so complex and onerous that no developer or contractor will initially comply therewith.

[5] June Order at 2, note 2. Respondents assert that once the Site was stabilized and the E & S Control Plan fully implemented by October of 2003, no further obligation to perform CCR inspection existed and any CWA obligations ceased and terminated. However, the General Permit Program is Chapter 9 of the Regulations Governing the Control of Water Pollution and § 9.1.02.7 B "Termination of Coverage" provides for the submission of a completed Notice of Termination (NOT) to the plan approval agency and determinations by that agency, inter alia, that (1) all items and conditions of the Plan have been satisfied in accordance with the Delaware Sediment and Stormwater Regulations; (2) as-built documentation verifies that the permanent stormwater measures have been constructed in accordance with the approved Plan and the Delaware Sediment and Stormwater Regulations; and (3)

Reports are lacking in probative value when sought by Complainant, but relevant and probative when offered or cited by Respondents. Respondents will be ordered to provide the Reports.

Interrogatory No. 3 and Document Request No. 4

Complainant requests information about the grass seed used for soil stabilization purposes at the Site during the relevant period (Discovery Memorandum at 6, 7). Document request No.4 requests all invoices and receipts, including purchase receipts, for the grass seed used for soil stabilization purposes at the Site during the relevant period. This information allegedly would show whether Respondents complied with the Delaware Erosion & Sediment Control Handbook when they did the Site's permanent stabilization in September of 2003.[6] According to Complainant, this information will prove that, if Respondents did not comply with the Handbook, then they did not achieve permanent stabilization throughout the Site, as concluded by the EPA inspection in May 2004 (id. at 7). Complainant states that this information has significant probative value in that evidence about grass seed could be significant in that Respondent's failure to comply with Handbook requirements caused problems with permanent stabilization. Complainant states that it understands that Mr. Addalli or his company performed the stabilization at the Site in September 2003 and says that the information is easily accessible to Respondents from Mr. Addalli and his company. Complainant says that this occurred over a short period of time and that no other sources exist from which to obtain this information. Complainant requested this information by letter to Respondents' counsel, dated March 27, 2006 (Motion Exhibit 2).

Respondents characterize this request as silly and contend that the type of grass seed used is irrelevant to the issue of whether or not the Site was properly stabilized under the legal provisions (Response at 3, 4). According to Respondents, the regulations only require "Stabilization", which is defined as the "establishment of soil cover through the implementation of vegetative or structural measures." (Delaware Sediment and Stormwater Regulations, Section 2, Amended March 11, 1993). Examples include, but are not limited to, straw mulch with temporary or permanent vegetation, wood chips, and stone or gravel ground cover. Respondents emphasize that the regulations do not limit stabilization to vegetation.

Discussion

Respondents' objections to Interrogatory No. 3 and Document Request No. 4 lack merit and are rejected. Erosion and Sediment Control Notes on the E&S Plans in the record provide, "Erosion and Sediment Control Sequence Of Construction Measures To Be Provided Or Upgraded, inter alia, "6. Stabilize All Inactive Disturbed Areas With Seed, Mulch and Tack As Per Seeding and Mulching Table On Sheet 2." Additionally, the Notes provide " 7. Stabilize 2.1.Slopes At Rear Of Buildings With Mat As Specified." The Plan specifies that slopes 2.1 or greater shall be stabilized with North American Green Stabilization Mat # C125. Additionally, "Topsoil and Seed Prior To Matting." These provisions together with "Seeding and Mulching

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final stabilization has been achieved in accordance with the definition in 9.1.02.0. It seems apparent that the Plan Approval Agency in this instance is the NCCDLU.

[6] Section 10.2.2 of the Delaware Sediment and Stormwater Regulations provides that all plans shall be consistent with the standards and specifications contained in the Delaware Erosion and Sediment Control Handbook and approved supplements. Additionally, the Erosion and Sediment Control Notes on the E&S Plans for the Christiana Town Center provide "1. All Erosion and Sediment Control Areas Shall Be In Accordance With The 'Delaware Erosion and Sediment Control Handbook'," dated 1989.

Table" on page 2 of the E&S Plan make it evident that vegetation including grass is required for stabilization purposes and to that extent, the type and quantity of grass seed is certainly relevant. Respondents will be ordered to answer Interrogatory No. 3 and to provide the documents encompassed by Request No. 4

Document Request No. 3

Document Request No. 3 asks for the most current map of the types and locations of all soil types (i.e., a soil map) at the Site. This Request included any particle size distribution analysis of each soil type present at the Site that Respondents or their contractors may possess. Additionally, this Request included reports on soil testing at the Christiana Town Center Site referred to by Frank Acierno in his deposition testimony on September 14, 2004, in an action styled *Acierno v.Goldstein & Lipsley [Lipsy]*, Civil Action No.20056.

Complainant says that soil test report would have probative value because a site's soil types affect the amount and frequency of runoff (Discovery Memorandum at 9). According to Complainant, it would use the information on soil characteristics and classifications when calculating the volume and frequency of storm water runoff. These calculations are allegedly necessary to show how often storm water discharges from the Site occurred (id.). Complainant says that it has done runoff and discharge calculations for the Site (Prehearing Exchange Exhibit No. CX-143) using very conservative assumptions about the Site's soil and that, if it had more specific information about the soil at the Site, it could do calculations that were even more reflective of the Site's conditions. Complainant asserts that this document request should not unreasonably delay the proceeding nor unreasonably burden the Respondents. Complainant points out that Respondent Acierno has acknowledged that the testing was done and states that it should be a simple matter for Respondents to check their files for the soil testing reports. Complainant says that the information is most reasonably obtained from Respondents or contractors under their control and that it knows of no other source for the soil test reports. While Complainant acknowledges that it has a copy of a general soil map for New Castle County (Prehearing Exchange Exhibit No. CX-141), it states that soil testing that occurs at a development site such as the instant one would provide much more specific information about site conditions (id. 9, 10). Complainant states that it requested the reports by letters, dated March 27 and November 29, 2006 (Motion Exhibits 2 and 4), but that Respondents either refused the request or failed to respond.

Responding, Respondents incorporate by reference their Objections, dated May 30, 2006, to a prior EPA information request (Motion Exhibit 5), which is principally to the effect that the requests are not relevant nor reasonably calculated to lead to the discovery of admissible evidence. Respondents assert that Complainant's proposition that it can perform a "pie-in-the – sky" study to evaluate what might have happened at the Site has absolutely no bearing on the outcome of this case (Response ¶ 5). According to Respondents, Complainant brought this case based on past history and that whatever evidence of that past history exists is the full extent of Complainant's case. Respondents contend that Complainant cannot posit a hypothetical analysis many years later, but must establish what actually happened at the Site during the relevant time period. Respondents say that Complainant's asserted need for this discovery points up the reason why it should be denied, i.e., it would unduly complicate this narrowly focused proceeding and open up a Pandora's box of speculation and conjecture. Moreover, Respondents point out that the Eagle Run Stream still exists and that Complainant can access it from other properties in order to assess sedimentation of the stream, if any.

In its Reply, Complainant cites *In re Leed Foundry, Inc*., Docket Nos. RCRA 03-2004-0061 & CWA 03-2004-0061, 2007 EPA ALJ LEXIS 13 (ALJ April 24, 2007)) as supporting the view that EPA may use a site's soil type as evidence of when storm water discharges have occurred.[7]

Discussion

Respondents' arguments are rejected and they will be ordered to provide the soil test reports and soil maps encompassed by Document Request No. 3. That the type of soil may affect the amount and frequency of runoff is seemingly nothing more than common sense. In addition, see the Delaware Erosion and Sediment Control Handbook (1989) (C's PHX 127 at 6) "Basic Principles of Erosion and Sedimentation" which provides "Erosion from land-disturbing activities is dependent upon the:[inter alia] Soil Characteristics-structure, texture, permeability and organic matter content…" Whether runoff and discharge calculations based on soil data will be "pie-in-the-sky" calculations as asserted by Respondents will depend on the strength and credibility of the testimony supporting such calculations. It should be noted that the soil maps and reports requested would of necessity have been compiled at a point more nearly in time to the performance of work at the Site.

Document Request No. 5

Complainant requests all photographs taken of the Site by Karl Faller, a former CCR inspector employed by Karins and Associates, a contractor for Respondents. Mr. Faller informed Complainant's counsel that he took photographs while conducting CCR inspections (Discovery Memorandum at 10). The CCR inspections were performed and the photographs were taken from late 2002 until late June 2003 and for a short time at the beginning of September 2003 (id. 11). Complainant contends that the photographs have substantial probative value because they support statements of significant violations in the CCR Reports. Complainant says it understands that the photographs were taken with a digital camera, and that it should be a simple matter to supply the photos in an electronic format and thus neither unreasonably delay the proceeding nor unreasonably burden Respondents. Respondent did not provide the photographs when requested by Complainant in a letter to Respondents' counsel, dated September 26, 2006 (Motion Exhibit 3).

Respondents assert that the need for photographs is unproven (Response Memorandum at ¶ 6). Respondents refer to the contacts by Complainant's counsel with Mr. Faller as questionable ethics on the basis that he is a person represented by counsel in pending litigation. Respondents point out the truism that a photograph is a snapshot in time, and contend that the fact that areas of a site may not be stabilized at a given moment has no bearing on the entire case because the regulations only require stabilization within 14 days after the last round of land disturbing activity (id.). Respondents say that photographs taken immediately after any significant storm event will unquestionably show that erosion and sedimentation have occurred, and that it is obvious Complainant wishes to obtain the photographs to sensationalize Site conditions. According to Respondents, they will present evidence at hearing that Mr. Faller is a disgruntled former employee of Karins & Associates who has it "out for Respondents" due to his frustration at being downsized as a professional engineer (id.). Respondents allege that Mr. Faller testified falsely under oath in an affidavit on behalf of New Castle County to further its illegal scheme to

[7] Id. at 3. It is understood that this decision is on appeal to the EAB.

harm Mr. Acierno. Respondents state that without waiving their objection, they will produce any photographs they intend to rely on at hearing.

Complainant strongly objects to Respondents' suggestion that Complainant engaged in a "questionable ethical practice" by contacting Mr. Faller, a former employee of a contractor for Respondents without informing Respondents' counsel (Discovery Reply at 3). Complainant cites Rule 4.2 of Delaware's Rules of Professional Conduct, which it says governs contacts with persons whom an attorney represents in a matter, and asserts that Rule 4.2 "does not require an attorney to contact opposing counsel before interviewing former employees such as Mr. Faller." (Id. at 3-4). In support, Complainant cites *Di Ossi v. Edison*, 583 A.2d 1343 (Del. Super. 1990). On the merits, Complainant notes that Respondents have either reserved the right to bring evidence such as photographs at hearing or include the evidence in their prehearing exchange exhibits, and contends that their argument is moot (id. at 2).

Discussion

There is not much to be said for Respondents' argument that the photographs requested by Complainant in Document Request No. 5 are not discoverable. Firstly, it is not for Respondents to determine whether there is a need for the photographs. The only issue here is whether the photos are relevant evidence of conditions at the Site at the time the photos were taken. Prima facie, this question requires an affirmative answer. Secondly, Respondents' contention that the photographs are simply a snapshot in time meaning nothing in the context of the overall case would be more cogent if, as Respondents imply, stabilization were a one-time requirement. Instead, the regulation, supra at 6, requires stabilization within 14 days of a land disturbing event, including stock piling, and until final stabilization is achieved, is in effect a continuous requirement. Respondents will be ordered to produce the photographs encompassed by Document Request No. 5.

Motion *In Limine*

In its Motion for Discovery and Motion *in Limine*, Complainant asks the ALJ to bar Respondents from introducing evidence within the scope of the Discovery Requests, if Respondents fail to comply with the Discovery Motion (Motion). In their Response, Respondents state that the information and documentation discussed in paragraphs 2 through 5 of the Response is completely irrelevant to the outcome of this proceeding and that, therefore, Respondents are in complete agreement that none of that evidence should be introduced at the hearing. Respondents further state that documents within the scope of matters at issue in paragraphs 1 and 6 that Respondents intend to introduce at the hearing will be provided in their prehearing exchange.

DISCUSSION

Respondents appear to be of the view that they may decline to comply with discovery requests or orders deemed to be irrelevant or lacking in probative value but, nevertheless, may produce and introduce evidence similar to that encompassed by the discovery requests deemed supportive of their case at a time of their choosing. Although Consolidated Rule 22.22(a)(1) admonishes the ALJ to admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable or of little probative value, except that evidence relating to settlement which would be excluded under Rule 408 of the Federal Rules of Evidence, the proviso to that Rule provides that, if a party fails to provide any document, exhibit, witness name or summary of expected

testimony required to be exchanged under Rule 22.19(a), (e) or (f) to all parties at least 15 days prior to the hearing, the ALJ shall not admit the document, exhibit, or testimony in the absence of a showing of good cause for failure to exchange the required information. In view of the foregoing, the ALJ has ample authority to sanction Respondents' failure to comply with discovery orders apart from Complainant's Motion in Limine. Examples of such sanctions are listed in Rule 22.20(g) *Failure to exchange information* and include at the discretion of the ALJ, that the ALJ may:

(1) Infer that the information would be adverse to the party failing to provide it;
(2) Exclude the information from evidence; or
(3) Issue a default order under § 22.17(c).

Complainant's Motion for Discovery is granted in part and denied in part as indicated above. All findings required by Rule 22.19(e)(1) to support the Discovery Order hereby entered are made either expressly or by implication, e.g., information and documents ordered to be provided will neither unreasonably delay the proceeding nor unreasonably burden the Respondents; the information is most reasonably obtained from Respondents and they have refused requests to voluntarily provide it; and the information has significant probative value on a disputed issue relevant to liability or the relief sought. Objections to the Order based on any alleged failure to make such findings will not be entertained. Although Complainant's Motion in Limine will not be granted at this time, Respondents are put on notice that failure to comply with the Discovery Order will result in sanctions such as those listed in Rule 22.20(g) supra.

2. Respondents' Motion To Dismiss

Under date of April 19, 2007, Respondents filed a Motion to Dismiss portions of the Complaint upon the ground of failure to state a claim upon which relief may be granted and the need to suppress illegally obtained evidence. Respondents point out that Counts I and II of the Complaint (paragraphs 72 and 77 of the original Complaint) allege that Respondents have violated Section 301 of the Act, 33 U.S.C. § 1311, by failing to "implement other requirements of the plans [from April of 2002 to January 2003]" (Motion at ¶¶ 1, 2). Respondents characterize these Counts as "ambiguous and overly general" and emphasize that despite the passage of 18 months since the filing of the initial complaint, the EPA has never sought to amend or formally modify these "amorphous averments" (id.). Respondents assert that this is a "quasi-criminal proceeding" and that specificity in pleadings is necessary in order to allow Respondents to properly prepare a defense to the charges alleged. In fact, Respondents point to Rule 22.14 "Complaint" of the Consolidated Rules of Practice (40 C.F.R. Part 22), paragraph (a)(3) of which requires that each complaint include "a concise statement of the factual basis for each violation alleged" (id. ¶ 3). Respondents contend that the allegation "other requirements" of the two plans were not fully implemented is wholly inadequate to apprise the Respondents of the nature of the violations alleged. According to Respondents, EPA has miserably failed to set forth claims with respect to the "other requirements" [of the alleged] violations and therefore that component of Counts I and II should be dismissed in order to narrow the issues and insure that Respondents' Due Process rights are properly respected (id.¶ 5).

Respondents renew their Motion to Suppress and Dismiss Allegations Arising From Unlawful Search, filed October 31, 2005 (Motion, ¶¶ 6 and 7). They point out that the

mentioned Motion was directed at evidence obtained during an EPA inspection of the Site on May 4, 2004, pursuant to an Administrative Warrant issued by the United States District Court for the District of Delaware. As indicated more specifically infra, in their Motion for a *Franks* Hearing, Respondents contend that the affidavit upon which the Administrative Warrant was based was essentially false and the resulting search unlawful. Respondents also assert that EPA unlawfully searched non-public areas of the Site on March 9, 2004, i.e., the storm water pond area which sits beyond the publicly accessible shopping center (id. ¶ 8). Therefore, Respondents argue that such evidence and any further evidence based thereon should be suppressed. Neither the United States District Court nor the ALJ reached the merits of Respondents' argument that the May 4 search was illegal, the District Court holding that the Motion to Quash [Suppress] should be denied because Respondents had failed to exhaust their administrative remedies, while the ALJ denied the October 31 Motion for reasons of judicial economy, holding that the time to rule on motions to suppress was when the evidence was proffered at hearing or trial (June Order at 11, 12). Respondents point out that Complainant filed a document on April 6, 2006 [Prehearing Exchange], which makes it clear that Complainant intends to introduce evidence in its case-in-chief at the hearing which was obtained during what Respondents characterize as an "unlawful search" on May 4, 2004. Respondents argue that the Motion to Suppress should be addressed prior to hearing and that all allegations of the Complaint arising from the unlawful search should be dismissed.

Under date of May 10, 2007, Complainant filed a Reply ("Response") to Respondents' Motion to Dismiss. Complainant quotes Paragraphs 79[8] (Count I) and 85[9] (Count II) of the Amended Complaint ("Complaint") and asserts that the Complaint provides Respondents sufficient notice of the violations that Complainant will seek to prove at hearing and the factual basis therefore (id. at 2, 3). Alternatively, Complainant argues that the Complaint taken together with its Prehearing Exchange give Respondents sufficient notice of the violations alleged by Complainant. Complainant acknowledges that Consolidated Rule 22.14(a) requires that each complaint shall include, inter alia, "(3) a concise statement of the factual basis for each violation alleged." (Response at 3). Complainant says that the Complaint must include enough detail to fairly inform the respondent of the claim it must defend, citing *In re Roger Antkiewicz, Inc., FIFRA Appeal Nos. 97-11 &* 97-12, 8 E.A.D. 218, 232 (EAB 1999). Complainant notes, however, that prior decisions have held that the Consolidated Rules allow Complainant to utilize notice pleading provided respondents are given notice of the nature of Complainant's claim, quoting *Robert J .Heser, Docket No.* CWA-05-2006-0002, 2007 EPA ALJ LEXIS 6 (ALJ, Feb. 23, 2007), which cites *Puerto Rico Aqueduct and Sewer Authority [PRASA], Docket No* EPCRA-02-99-4003, 1999 EPA ALJ LEXIS 72 (ALJ Oct. 4, 1999). PRASA , in turn, cites and relies on *Commercial Cartage Company, Inc.*, CAA Appeal No.93-2, 5 E.A.D. 112, 117 (EAB. 1994) (a complaint must set forth factual allegations that, if proven, establish a prima facie against the respondent). The Prehearing Exchange required by Consolidated Rule 22.19(a) is intended to place the opposing party on notice of the evidence it will face at hearing and is a substitute for discovery. Complainant points out that the Prehearing Exchange has a binding effect on its

[8] "After approval of the April 2002 [E&S] Plan, Respondents failed to stabilize the Site and implement other requirements of the Plan as required by Section 301 of the Act, 33 U.S.C. § 1311, and the NPDES General Permit."

[9] "Respondents have violated Section 301 of the Act, 33 U.S.C. § 1311, and the NPDES General Storm Water Permit by failing to stabilize the Site, maintain the forebay and implement other requirements of the January 2003 [E&S] Plan."

proponent because it limits the witnesses and exhibits the proponent can use at hearing to those contained in its Prehearing Exchange, subject to Rules 22.22(a) (15-day rule) and 22.19(a)(1) (failure to identify witnesses or exhibits) (Response at 3, 4).

Complainant rejects as unsupported Respondents' assertion that this is a quasi-criminal proceeding, implying some unstated need for heightened procedural safeguards. Complainant proceeds to list the violations encompassed by the "other requirements" of the "E&S" Plans contained in Complainant's Prehearing Exchange. Complainant says that: (A) Respondents failed to maintain required erosion controls at the Site, because, at various times, they did not maintain the Sediment Traps and the Sediment Basin by stabilizing the areas immediately surrounding the Traps and Basin; they did not maintain the storm water outfall from Sediment Trap 2, they did not remove excess sediment from the Sediment Basin and Sediment Traps, and they did not maintain the silt fencing on the Site (id .4). These maintenance failures allegedly took place during the period May 20, 2002, to September 23, 2003. It is further alleged: (B) that on at least six different occasions from January 3, 2003, to August 27, 2003, Respondents allowed a bank to an unnamed tributary to Eagle Run to wash out; (C) that from August 22, 2003, to September 22, 2003, Respondents failed to provide erosion control for catch basins (also known as storm water inlets or catchment basins) at the Site; and (D), that the Respondents did not submit weekly Certified Construction Reviewer ("CCR") Reports to the County for three periods: April 24 to December 31, 2002 (except for four reports); August 13 to September 6, 2003; and May 4, to November 1, 2004 (id. 5).

Complainant states that the Complaint by itself provides a factual basis for these types of violations, pointing out that paragraphs 46, 48, 52 and 54 of the Complaint allege that Respondents submitted E&S Plans that showed the layout of controls at the Site and that paragraphs 55 and 56 of the Complaint allege that on January 30, 2003, the New Castle County Department of Land Use issued a Notice of Rule to Show Cause Decision ("January 2003 Show Cause Decision") that referenced many violations at the Site, including the four types of violations listed in A through D supra. Paragraph 56 of the Complaint states that the January 2003 Show Cause Decision cited Respondents for specific failures to maintain erosion controls at the Site and found 27 violations at the Site including, among others, failing to install a forebay in the storm water management basin, failing to stabilize all disturbed areas; and not installing stabilized construction entrances, a silt fence and sediment traps in accordance with the April 2002 Plan. Additionally, Complainant states that the January 2003 Show Cause Decision cited Respondents' failure to prevent wash outs of the bank to the unnamed tributary and their failure to protect the catch basins (id. 6). Finally, Complainant notes that paragraphs 62-64 of the Complaint set out the requirements for Certified Construction Reviewers to inspect the Site and submit [weekly] CCR Reports and that the January 2003 Show Cause Decision ordered Respondents to submit CCR Reports. Complainant alleges that the January 2003 Show Cause Decision and directives from a January 9, 2003 [NCCDOLU] hearing support citing Respondents for failure to submit CCR Reports in 2002 (Response at 6). The Complaint, however, only indirectly alleges failure to submit CCR Reports in 2002, reciting that the March 2002 Show Cause Decision specifically cited Respondents for a number of violations including, among others, failure to submit Certified Construction Reviewer Reports (Complaint ¶ 44).

Complainant states that its Prehearing Exchange supplements the Complaint by providing more specifics concerning the violations alleged in the Complaint and that Complainant will show at the hearing (Prehearing Exchange narrative at 3-5). Complainant points out that the

Prehearing Exchange narrative states the period of the violations, references the evidence that Complainant will rely on to prove the violations, and lists the witnesses and their testimony with attached copies of Complainant's documentary exhibits (Response at 7). According to Complainant, this gives Respondents a basis [to prepare] their defense. Thus, Complainant argues that the Complaint and Prehearing Exchange together provide Respondents the concise statement and notice required by Rule 22.14(a)(3). Alternatively, Complainant seeks leave to amend the Complaint, if the Complaint and the Prehearing Exchange do not satisfy the requirement of Rule 22.14 for specific pleadings.

Respondents filed their Replies in Support of Their Motion to Dismiss and in Support of Their Motion for *Franks* Hearing by letter, dated May 21, 2007, by which they requested oral argument on the Motions. Neither Motion is considered to have sufficient merit as to warrant oral argument and the Motions for oral argument will be denied.

According to Respondents, Complainant's Response to Respondents' Motion to Dismiss rests on three arguments: 1) the Prehearing Exchange provides Respondents with an adequate explanation of the violations alleged; 2) even if the Prehearing Exchange is legally inadequate, the Complaint should be amended *sua sponte* and *nunc pro tunc*; and 3) the Motion is premature and unsupported to the extent it relies on an illegal search (Reply at 1, 2). Respondents assert that all of EPA's arguments are without merit.

Respondents argue that (insofar as the sufficiency of the Complaint to state a claim upon which relief may be granted is concerned) Complainant's Prehearing Exchange is irrelevant and of no legal effect. Respondents again emphasize the requirement of Rule 22.14(a)(3) that the complaint contain "a concise statement of the factual basis for each violation alleged", argue that the allegation that Respondents violated "other requirements" of the E&S Control Plan falls far short of the requirement for a "statement of the factual basis for the violation alleged," point out that the Plan contains numerous measures including silt fences, storm water retention basins, sediment basins, inlet protection, catch basins, stabilized construction entrances and the like, and that there are numerous "Notes" on the Plan regarding stabilization, types of matting, special treatments to dissipate turbidity, sequence of construction, etc. (Reply at 3). According to Respondents, to say that "other requirements of the Plan have been violated" is to allege one or more of dozens of potential Site deficiencies. Respondents note that the Complaint does not even allege the date or dates when the potential violations supposedly occurred and assert that they are forced to engage in guesswork in attempting to discern the violations which are alleged against them. They argue that they cannot prepare a defense to such an imprecise, murky pleading.

Respondents say that Complainant's theory that it may ignore the requirements of the Consolidated Rules and cram numerous possible allegations [violations] into this proceeding pursuant to the production of thousands of pages of documents is unsupported by any legal theory (id. 4). Indeed, they contend it would violate the principles of fundamental fairness and Constitutional Due Process to allow Complainant to automatically amend the Complaint without any notice or opportunity to be heard provided to the Respondents. Respondents point out that Rule 22.14(c) provides that [after an answer has been filed] the complaint may only be amended upon motion granted by the Presiding Officer and that Rule 22.14(a)(5) indicates that Respondents are entitled to a hearing on the material facts which are alleged in the Complaint. Therefore, Respondents contend that Complainant is procedurally barred from attempting to interject documents from its Prehearing Exchange into the proceeding in an effort to prop up an

insufficient Complaint. Moreover, Respondents cite Consolidated Rule 22.15(b), providing that the answer "shall clearly and directly admit, deny or explain each of the factual allegations in the complaint with regard to which respondent has any knowledge" and assert that, unless and until EPA states its claims in a complaint, no answer and defenses can be provided (id. 5). Respondents also note that Rule 22.15(c) provides that a respondent may request a hearing upon the issues raised by the complaint and answer, and argue that the hearing is limited to issues which have been adequately pled in the Complaint. Respondents assert that Complainant fundamentally misunderstands the purpose of the Prehearing Exchange in that the Prehearing Exchange is a hearing preparation matter having nothing to do with the charges Complainant is permitted to pursue at the hearing (id. 6). Respondents state that Complainant must move to amend the Complaint, if it wishes to add new claims, and contend that they would certainly be prejudiced by the late addition of new claims (id. 8). Respondents point out that Complainant's Response to Respondents' Motion to Dismiss is not a motion to amend the complaint and argue that any such motion would likely be denied upon the ground of futility under the pleading standards of the Consolidated Rules of Practice (id. 9).

Finally, Respondents argue that because Complainant has signaled its intention to rely on the ill-gotten evidence from the alleged illegal search [on May 4, 2004], the ALJ should decide the issue (id. 9, 10). According to Respondents, whether the Motion is considered to be a Motion to Suppress, a Motion in Limine, or a dispositive prehearing motion is irrelevant. Respondents say that what is relevant is that significant evidence tends to establish that Affiant Charles Schadel misrepresented all material facts contained in his affidavit, and that such falsifications were the sole basis for the issuance of the *ex parte* Administrative Search Warrant. But for the tainted search, Respondents contend that no evidence of violations in May of 2004 exists. Without any citation of authority, Respondents assert that dispositive motions, Motions to Suppress, and Motions in Limine are not decided during trial, but before trial. They argue that it makes sense to narrow the issue for trial and to avoid interruptions and potential hearing continuances that may result from rushed, attention-diverting evidentiary issues in the middle of a hearing. Respondents request that the ALJ enter an order dismissing the "other requirements" allegations of the Complaint and the allegations in the Complaint which arise from the illegal search conducted by EPA.

Discussion

While Respondents are correct that the Complaint must stand or fall on the allegations therein and that materials outside of the Complaint such as a Prehearing Exchange may not be considered in determining a motion to dismiss for failure to state a claim (*PRASA, supra),* their Motion fails because the "other requirements" violations alleged in Counts I and II may not be viewed in isolation, but must be considered in the context of other allegations in the Complaint. For example, it is immediately apparent that paragraph 72 of the initial Complaint (Amended Complaint, ¶ 79) alleges that Respondents have violated Section 301 of the Act, 33 U.S.C. § 1311, and the NPDES General Storm Water Permit by "failing to stabilize the Site and implement other requirements of the April 2002 Plan" and that Respondents have omitted the language "failing to stabilize the Site" in their attack on the Complaint as too general to state a claim. Count II (Amended Complaint, ¶¶ 82 and 83) alleges that, if NCCDLU did not approve the January 2003 Plan, Respondents violated Section 301 of the Act, 33 U.S.C. § 1311, and the NPDES General Permit by engaging in land disturbing activities without an approved Sediment and Stormwater Plan. Alternatively, if NCCDLU approved the January 2003 Plan, Count II

(Amended Complaint, ¶¶ 84 and 85), alleges that Respondents violated Section 301 of the Act, 33 U.S.C. § 1311, by failing to stabilize the Site, maintain the forebay, and implement other requirements of the January 2003 Plan. Moreover, "other requirements of the April 2002 Plan" are not as numerous and nebulous as Respondents would have it. It is well settled that in considering motions to dismiss under Consolidated Rule 22.20(a), the issue is whether the Complaint sets forth facts which, if proven, establish a prima facie case against the respondent. See *Commercial Cartage Company, Inc.*, CAA Appeal No. 93-2, 5 E.A.D 112 (EAB, 1994). See also, *Asbestos Specialists, Inc.,* TSCA Appeal No. 92-3, 4 E.A.D. 819 (EAB, 1993). Here, as to Count I, Respondents concentrate on paragraph 79 of the Complaint which provides that: after approval of the April 2002 Plan, Respondents failed to stabilize the Site and implement other requirements of the Plan, as required by Section 301 of the Act, 33 U.S.C. § 1311, and the NPDES General Permit. Respondents omit the language "Respondents failed to stabilize the Site" in an effort to make paragraphs 79 and 80 if the complaint appear more general and non-specific than they are. The language "failed to stabilize the Site," together with the language of paragraph 56 which alleges that the January 2003 Show Cause Decision found 27 violations at the Site including, among others, failing to install a forebay in the storm water management basin, failing to stabilize all disturbed areas; and not installing stabilized construction entrances, [not installing] a silt fence, and sediment traps in accordance with the April 2002 Plan, place Respondents on notice of the alleged violations. This language together with the allegations in paragraphs 79 and 80 of the Complaint is sufficient to establish a prima facie case of violations of Section 301 of the Act, 33 U.S.C. § 1311, the General Storm Water Permit and the April 2002 Stormwater ("E&S") Plan. If the language of paragraphs 79 and 80 of the Complaint is sufficient to establish a prima facie case of a violation of Section 301 of the Act, 33 U.S.C. § 1311, the NPDES General Permit and the April 2002 E&S Plan, then a fortiori is the language of paragraphs 84 and 85 of the Complaint containing the language "failing to stabilize the Site, maintain the forebay, and implement other requirements of the January 2003 Plan" sufficient to establish a prima facie case of violation of Section 301 of the Act, 33 U.S.C. 1311, and the NPDES General Permit. It follows that the Respondents' Motion to Dismiss is lacking in merit and will be denied. It is of course clear that, if merit were found in the Motion to Dismiss, and the Motion were to be granted, the dismissal would be without prejudice, meaning that Complainant would be free to file an amended Complaint. See, e.g., *Commercial Cartage,* supra.

3. Respondents' Motion For *Franks* Hearing

Under date of April 19, 2007, Respondents filed a Motion for a *Franks* Hearing to contest the validity of the affidavit used by EPA to obtain an Administrative Search Warrant from the United States District Court for the District of Delaware to inspect the Christiana Town Center ("Site"). Evidence obtained during an inspection by EPA personnel pursuant to the Warrant forms the basis for some of the violations alleged in the Complaint. A *Franks* Hearing permits a defendant to attack the veracity of an affidavit used to obtain a search warrant after the warrant has been issued and executed. *Franks v. Delaware*, 438 U.S. 154 (1978).

Respondents point out that the United States District Court denied their motion for a *Franks* Hearing on the ground that it was premature in that EPA had yet to use any of the information or evidence obtained during the inspection pursuant to the Search Warrant. (Motion ¶ 2). As noted supra, the Court's denial of a *Franks* Hearing, treated as a motion to suppress, was also based in part on Respondents' failure to exhaust administrative remedies. Pointing to a

portion of the deposition of Stephen Hokuf (Exh B), a New Castle County government employee who regularly inspected the Site, Respondents allege that Mr. Hokuf was unable to articulate any violations at the Site as of the date of his deposition, November 19, 2003.[10] According to Respondents, Mr. Hokuf's inability to find fault with the Site is no surprise given that the Site was given a "clean bill of health" by two consecutive CCR Reports produced in October [7 & 13] 2003 (Exh C). Respondents also cite the affidavits of Gejza Csoltko, an engineer, dated October 15, 2003 (Exh D) and Sebastiano Addalli, a Certified Construction Reviewer, dated October 16, 2003 (Exh E). Mr. Csoltko indicates that he visited the Site on the date of his affidavit. Mr. Addalli visited the Site and took pictures of the Site and surrounding areas on October 14, 2003. Mr. Csoltko's affidavit is to the effect that there is no basis for concluding the storm water practices at the Site are not functioning at an 80% or better efficiency rate for the removal of suspended solids as required by the regulations. Mr. Addalli's affidavit concludes that from a CCR standpoint, the Site remains in a "satisfactory" state and is in "compliance." Respondents also rely on CCR Reports in March of 2005 and in 2006 that the Site remained fully stabilized and in compliance with all requirements of the law (Exhs F, G, and H).

Allegedly intentionally false statements contained in the Schadel Affidavit which was used to support the Administrative Search Warrant issued by the District Court include the assertion that certain erosion and sediment control measures required by the erosion and sediment control plan for the Site "may not have been properly implemented" based on his review of reports sent by the developer to the County (Affidavit at ¶ 10). Respondents allege that the exhibits attached to their Motion referred to supra prove the falsity of Schadel's statement (Motion, ¶ 9). This assertion will not withstand analysis because there are allegations that other CCR Reports submitted to the County reflect unsatisfactory conditions at the Site and violations of the General Permit (June Order, notes 2 and 13). As noted supra, the requirement for permanent or temporary stabilization is within 14 days after a land-disturbing or stockpiling activity.

The next allegedly false statement in the Schadel Affidavit is that construction activities were taking place at the time of his March 9, 2004 inspection. This is an exaggeration as the Affidavit does not specifically state that construction activities are taking place at the time of the inspection, but states that discharges associated with industrial activity, namely construction activity, may be occurring from the Site (id.¶ 11). The discharges referred to could be associated with past construction activity. Moreover, the thrust of the Affidavit is that further construction activity was indicated or required which is relevant in view of Respondents' contention that the project [Phase 4] had been completed and the Site stabilized. For example, Respondents refer to paragraph four of the Schadel Affidavit where he refers to a partially developed area covered with gravel (Exh 2, Photos 3, 4, 5, 6, 7, and 8), which may need more grading for paving and the construction of buildings. Respondents assert that it is not unusual coming out of a harsh winter that a few isolated areas of site would be sparsely vegetated (Response to March 6 Order at 13, ¶ 3). Additionally, Mr. Schadel took photos of concrete storm sewer pipe (Exh 2, Photo 8), which he observed would be a construction activity which could create a discharge. It seems obvious

[10] This portion of Mr. Hokuf's deposition testimony is not as clear as Respondents would have it, because he testified at page 186 that it is the County's opinion that the basin is not functioning properly and needs maintenance. He acknowledged that this was not an official determination. In additional deposition testimony, provided by Complainant's Response to Respondents' Motion for *Franks* Hearing, Mr. Hokuf opined that the Site still required New Castle County inspections and that the frequency of those inspections depended upon the weather and Site activity (id. 39).

that installation of the pipe would require construction or land-disturbing activity. While Respondents correctly point out that possible future construction activities do not constitute current, actual construction activities, and allege that there is no evidence that the concrete pipe was to be installed,[11] this does not prove the falsity of the Affidavit, because the Affidavit does not expressly state that construction activity is occurring at the time. Respondents may be confusing the Schadel Affidavit with the Amended Complaint which alleges that at the time of the EPA inspection pursuant to the Search Warrant on May 4, 2004, the inspectors saw a backhoe move dirt and gravel from one section of the Site to another (id. ¶¶ 66, 67). Respondents contend that only gravel was being moved and that the placement of gravel for stabilization purposes is in accordance with Delaware law (Response to March 6 Order at 13, 14; ¶¶ (3) and (5)).

Another allegedly false statement in the Schadel Affidavit is the allegation (¶ 4.a) that the storm water management basin was required to be divided into two bays. This statement is false according to Respondents because the most recent approved erosion and sediment control plan, signed by Frank Acierno on January 10, 2003, which Schadel utilized in his inspection on March 9, 2004, does not contain any topographical lines indicating there is any difference in the grade of the bottom of the storm water pond which would support his contention that the pond needed to be maintained in separate sections.[12] While the assertion that there are no topographical lines indicating differences in elevation at the bottom of the sediment basin, which might be indicated by a requirement for a forebay,[13] appears to be accurate, lines on the E&S Plan appear to contemplate that the basin be maintained in separate sections. As indicated infra, discovery requests by Respondents (Requests for Admissions, ¶ 2) raise the argument that, if two bays were required, the requirement only applied during construction. Respondents also attack as unfounded the assertion that there "was significant sediment discharge from the Site to Eagle Run" based on photos (Schadel Affidavit, Exh 2, Photos 11-14) showing cloudy water at the discharge point where storm water from the pond discharges to the Eagle Run stream. Respondents emphasize that other photos show clear water at this discharge point.

Schadel allegedly knew that his allegations that additional construction activities would need to be undertaken at the Site were false based in part on the assertion that in February or March of 2004 he participated in a telephone conference with Respondents' counsel and was

[11] Respondents' assert that storing concrete drainpipe on a site means nothing other than it is stored for purposes of use somewhere and it is illogical to assume that it means anything about whether there are ongoing land disturbing activities (Response to March 6 Order at 13, ¶ (3)). Respondents make no reference to whether the presence of the pipe is an indication of anticipated future construction or land disturbing activity. As indicated infra, the Request for Admissions ¶ 3 asks that Complainant admit the concrete pipe referenced in paragraph 4.d of the Schadel Affidavit is not shown as proposed for future installation on any Plan for the Site.

[12] As indicated supra, the parties disagree as to whether the E&S Plan, signed by Frank Acierno on January 10, 2003, was approved by the NCCDLU. Respondents' Interrogatory No.2 asks why this Plan, which Complainant contends was never approved by NCCDLU, was used by Mr. Schadel in support of the Application to the United States District Court for an Administrative Warrant.

[13] Among the definitions of "forebay" is "[a] reservoir or canal from which water is immediately taken to run a waterwheel, turbine or other equipment." Webster's Third New International Dictionary (2002). Section 10.3.M of the Delaware Sediment and Stormwater Regulations provides: "All ponds shall have a forebay or other design feature to act as a sediment trap. A reverse slope bench must be provided one foot above the normal pool elevation for safety purposes and all embankment ponds, having a normal pool, shall have a drain installed to facilitate maintenance."

privy to correspondence (letters to EPA counsel, dated March 2 and March 8, 2004, Schadel Affidavit, Exh 4) from Respondents' counsel which made it clear that there was no intention, need, or requirement as a practical matter or as a matter of law for any additional construction activities at the Site. Respondents assert that once all of the false contents of the Schadel Affidavit are stripped away, the only thing that remains are guesses, surmises, and conjecture on his part (Motion, ¶ 10). Respondents argue that a *Franks* Hearing is appropriate when a defendant makes a substantial showing that either false statements or statements made with reckless disregard for their accuracy are included in an Affidavit supporting a search warrant (id. ¶ 13). According to Respondents, once the pure speculation that remains after the intentionally false statements in the Schadel Affidavit are stripped away, there is no justification whatsoever to support a finding of probable cause to issue the Administrative Search Warrant.

Opposing the Motion, Complainant contends that the Motion should be denied because the Respondents have not justified holding a separate *Franks* Hearing apart from the regular hearing for the reception of evidence in this matter (Reply [Response] to Respondents' Motion For a *Franks* Hearing at 3, 4). Complainant argues that Respondents have not offered a compelling reason for holding a *Franks* Hearing now as opposed to reviewing the weight and admissibility of the evidence [in the normal manner] at the main evidentiary hearing. Complainant says that Respondents' contention an inquiry into whether the evidence should be suppressed at the main evidentiary hearing would [unduly] prolong the hearing will not withstand scrutiny as the ALJ and the parties will have to expend the same amount of time dealing with this issue now or at the main hearing. Complainant points out that the June 30 Order denied the Respondents' Motion to Suppress, holding that the question of suppression could [should] be addressed when the evidence was proffered at the hearing or trial. Complainant urges that this ruling should be adhered to as a separate *Franks* Hearing is unneeded now.

Secondly, Complainant asserts that Respondents' Motion for a *Franks* Hearing should be denied because it is not accompanied by the type of evidence necessary to support such a hearing (id. 4). Complainant says that allegations of deliberate falsehood or of reckless disregard for the truth must point out specifically the portion of the warrant affidavit claimed to be false and must be accompanied by an offer or proof, including affidavits or sworn or otherwise reliable statements of witnesses or a satisfactory explanation for their absence, citing *Franks.* Complainant emphasizes that none of the CCR Reports or the affidavits of Gejza Csoltko or Sebastiano Addalli relied on by Respondents are contemporaneous with or contain statements contemporaneous with Mr. Schadel's inspection of the Site. Complainant says that the thrust of Mr. Hokuf's deposition testimony is that Site stabilization is a work in progress rather than a final product (id. 5). Moreover, the Motion is not accompanied by an affidavit from Mr. Acierno or other knowledgeable person about Site conditions at the time of Mr. Schadel's Public Area Inspection. Regarding counsel's representation that he informed Mr. Schadel that there was no intention, need, or requirement to undertake "additional construction activities" at the Site as a practical matter or as a matter of law, Complainant points out this statement contains very little information about his representation to Mr. Schadel [as to actual Site conditions] (Response at 6). For example, Complainant notes that counsel doesn't explain what he meant by "construction activities" or whether his statements were based on direct observation or hearsay statements made to him. It should also be noted that Mr. Schadel saw and photographed other objects indicative of continuing construction activity or the likelihood thereof, i.e., bulldozers

and dump trucks parked at the Site (Exh 2, Photos 5, 6, and 7), concrete pipe which had not been installed, and dirt piles which did not appear to have been stabilized (Exh 2, Photos 3 and 4).

Finally, Complainant asserts that Respondents have grossly mischaracterized the statements in Mr. Schadel's Affidavit. Complainant points out that, as indicated supra, Schadel saw a site with the potential for additional construction activity, specifically, a graveled area that might need additional construction activity to make it ready for paving and the construction of buildings, and concrete storm sewer pipes, installation of which would be a construction activity that could create a discharge (Response at 7). Complainant emphasizes possible problems at the Site, i.e., potentially unstabilized areas, upstream of the Sediment Basin's discharge to Eagle Run, the stream was clear, while downstream it was cloudy. Additionally, Complainant says that Schadel saw a Sediment Basin that appeared to lack a forebay, which the E&S Plans indicated were to have one. The basis for the latter assertion is not apparent as the E&S Plans in the record do not mention a forebay or clearly require one. It is true, however, that the Delaware Sediment and Storm Water regulations require a forebay (§ 10.3 M).

Under date of May 21, 2007, Respondents filed a Reply In Support of Motion for a *Franks* Hearing. Respondents say that Complainant's Response presents two arguments in opposition to a *Franks* Hearing: 1) a separate *Franks* Hearing is allegedly unjustified; [if held] it should be held during the final hearing in this proceeding; and 2) the Respondents supposedly have not provided adequate evidence supporting a *Franks* Hearing. According to Respondents, these bases of opposition are without merit.

Respondents assert that a *Franks* Hearing is by nature separate from and prior to the trial (Reply at 2). According to Respondents, the purpose of a *Franks* Hearing is to obtain evidence to buttress a motion to suppress the ill-gotten gains of an unlawful search based on credible evidence that EPA's star affiant (Mr. Schadel) made intentionally and recklessly false statements in order to obtain the ex parte Administrative Warrant (id. at 3).

Discussion

Complainant's argument is, of course, not that a *Franks* Hearing should be held at or about the time of the main hearing, but that a *Franks* Hearing has not been shown to be justified and should not be held at all. Although Respondents have repeatedly characterized statements in the Schadel Affidavit as intentionally and recklessly false, as indicated supra, these assertions have not been proven and will not withstand analysis. Respondents rely heavily on the deposition testimony of New Castle County inspector Stephen Hokuf, taken on November 19, 2003, approximately four months prior to his Public Site inspection with Mr. Schadel on March 9, 2004. According to Respondents, Mr. Hokuf, whose last Site inspection was in late October 2003, could not articulate any violations at the Site. Respondents say that this fact together with the CCR Reports, dated October 7 and October 13, 2003,[14] which reflect that the Site was in compliance, indicate that the Site must be given "a clean bill of health" and that allegations to the contrary in the Schadel Affidavit are false. Firstly, the CCR Reports and Mr. Hokuf's inspection in October of 2003 are not contemporaneous with the Schadel-Hokuf Public Site inspection on March 9, 2004. Secondly, the Hokuf deposition is not as clear that the Site was in compliance as Respondents' contend because he indicated the basin was not functioning properly and needed

[14] Although the CCR Reports, dated October 7 and October 13, 2003, support Respondents' contention that the Site was in compliance on those dates, Respondents understandably make no mention of the fact that the Reports reflect that the Site is inactive rather than completed.

maintenance (supra, note 10). Finally, there is merit in the contention that the evidence reflects that the Site is a work in progress rather than a completed project. In any event, Respondents contention that the Site has been stabilized in accordance with the E&S Plan and the E&S Plan fully implemented has not been established and is a matter for evidence at the hearing. It should be noted that the Settlement Agreement entered into between Respondents and the County in December of 2005 reflects that the County had reservations about Respondents' then current compliance (June Order at 21). While these concerns appear to have been satisfied or at least alleviated by statements from Howard L. Robertson, Inc., Registered Professional Engineers and Land Surveyors, as evidenced by letters to the County, dated January 10 and June 29, 2006, referred to infra, Respondents' allegation that no work took place at the Site from October of 2003 through March of 2005 has not been established. This also is a matter for evidence at the hearing. Respondents' Motion for a *Franks* Hearing will be denied. This, of course, means that issues as to the admissibility of evidence obtained pursuant to the Search Warrant will be addressed if and when the evidence is proffered at the hearing.

4. Respondents' Motion For Discovery By Written Interrogatory Questions, Document Requests and Requests For Admission and for Depositions Upon Oral Questions

Under date of April 19, 2007, Respondents filed a Motion for Discovery by Written Interrogatory Questions, Document Requests and Requests for Admission (Motion). Simultaneously, Respondents Submitted a Request for Admissions and Agency Records, which was incorporated by reference into the mentioned Motion, together with a Motion For Depositions Upon Oral Questions. The latter Motions are considered infra. Because no hearing date has been set, Respondents assert that the taking of this discovery will not unreasonably delay this proceeding (Motion, ¶ 3). Additionally, Respondents argue that the requested discovery will not unreasonably burden EPA, because it involves issues which will ultimately be raised at the hearing and less time will need to be expended in cross-examining witnesses at the hearing (id. ¶ 4). According to Respondents, critical information regarding EPA's singling out the Respondents for selective prosecution, conspiracy with the County to carry out an illegal scheme against the Respondents and similar defenses can only be established pursuant to the discovery of evidence known and possessed by the EPA (id. ¶ 6). Respondents allege that the information is highly probative to the Respondents' potential liability in this action because it will reveal information necessary to prove numerous affirmative defenses asserted by Respondents. Respondents note that of 25 affirmative defenses initially asserted, 17 remain pending. This, if accurate, is nevertheless a misleading assertion, because it is unlikely that evidence tending to establish these defenses will be produced, e.g., EPA fraud, in which case, the defense will be dismissed sub silentio. (See Order Granting in Part and Denying in Part Complainant's Motion to Strike, dated February 28, 2007, at 14).

Upon information and belief, Respondents allege that the sole reason EPA became involved in this matter was at the behest of the County who had become frustrated by the fact that it was unable to fully carry out its plot to harm Respondent Frank Acierno and advance the political agendas of the corrupt former County Executive and former Chief Administrative Officer.[15] Respondents refer to the Schadel Affidavit upon which the District Court relied in issuing the Search Warrant as containing numerous false and factually unsupported and

[15] Motion at ¶ 8. The former County Executive and the County's former Chief Administrative Officer were indicted for alleged violations of the Racketeering and Corrupt Organizations Act ("RICCO") (Order Granting in Part and Denying in Part, Complainant's Motion to Strike, dated February 28, 2007, note 11).

unsupportable assertions (id. ¶ 9). Respondents allege that Schadel intentionally made misrepresentations to the Court so that he could obtain a search warrant which he sought out of anger at being denied access to the Christiana Town Center Site. Respondents further allege that no work took place at the Site from the time that the approved Erosion and Sediment Control Plan was fully implemented in October of 2003 through and including March of 2005. This fact is allegedly confirmed by Certified Construction Review Reports which the County relies upon as evidencing full compliance for a construction site to be in conformance with NPDES provisions (id. ¶ 10). Respondents point out that a detailed engineering review conducted in 2006 in furtherance of the Settlement Agreement entered into with the County in December of 2005, regarding erosion and sediment conditions at the Site, establish that it was still in conformance with all legal requirements, including those necessary to establish conformance with NPDES provisions of the CWA (id. ¶ 11). In support, Respondents cite letters to the County, dated January 10 and June 29, 2006, from Howard L. Robertson, Inc., Registered Professional Engineers and Land Surveyors (Exhibits G and H to Respondents' Motion For *Franks* Hearing). Respondents allege that this action was initiated in bad faith based upon misrepresentations by Mr. Schadel who had the utmost ill-intent to harm Mr. Acierno and justify the improper actions taken by Schadel and EPA prior to [issuance of the Complaint on] September 29, 2005 (id. ¶ 12). It is further alleged that the County was singling out Mr. Acierno in order to advance the political campaign of Chief Administrative Officer Sherry Freeberry, who was running for the office of County Executive in 2004. According to Respondents, the County wanted to continue garnering headlines in order to advance Ms. Freeberry's political campaign even after the approved Erosion and Sediment Control Plan had been fully implemented and the Site stabilized in October of 2003 (id.¶ 14). Respondents say that, if proven, one or more of the stated defenses in this matter would almost certainly constitute an absolute defense to one or more of the charges alleged by EPA. Therefore, Respondents contend that discovery is essential in order to enable Respondents to adequately prepare their defense to the charges alleged.

Under date of May 22, 2007, Complainant filed a Reply [Response] to Respondents' Motion for Discovery referred to supra. Complainant alleged that the Motion was procedurally defective and must be denied because Respondents had not fully complied with the Prehearing Exchange Requirements of Consolidated Rule 22.19(a)(1) and the ALJ's Orders, dated March 6, 2007, May 8, and May 9, 2007 (General Objections at 2). Complainant points out that the "Other discovery" provided by Consolidated Rule 22.19(e)(1) is applicable "[a]fter the information exchange provided for in paragraph (a) of this section." Complainant also objects to Respondents' Requests for Admission upon the ground that Respondents have not satisfied the requirements of Rule 22.19(e).[16] By a Supplement to its Reply, dated June 14, 2007, Complainant stated that Respondents had completed the filing requirements for their Prehearing Exchange and thus, Complainant withdrew its procedural objections to Respondents' Motion for Discovery.

[16] Rule 22.19(e)(5) provides in pertinent part: "[n]othing in this paragraph (e) shall limit a party's right to request admissions or stipulations…." Complainant, citing *Lake County*, Docket No. CAA-8-99-11 (Order Granting in Part Request for Admission (ALJ June 28, 2000)), argues that by seeking the ALJ's assistance in obtaining admissions without giving Complainant an opportunity to respond voluntarily, Respondents have subjected the request to the requirements of Rule 22.19(e) with which the request does not comply. Although Respondents deride the notion that requests for admission are voluntary, their placement in Rule 22.19(e)(5) in conjunction with "stipulations", which may not be regarded as mandatory, strongly implies the contrary.

Complainant contends that Respondents' Interrogatories and Requests for Admissions are overly burdensome, pointing out that Respondents have proposed 46 Interrogatories, 69 Requests for Admission and numerous requests for documents (Response at 7). Complainant alleges that this excessively large number of discovery requests creates an improper burden on EPA in view of the fact that Respondents have also submitted a Freedom of Information Act ("FOIA") request to which EPA was then preparing a response. While recognizing that Consolidated Rule 22.29(e)(5) permits Respondents to exercise their rights under FOIA during a Part 22 proceeding and that the ALJ has no jurisdiction over FOIA, Complainant asserts that it is nevertheless appropriate for the ALJ to consider information Respondents have obtained through means other than Part 22 discovery in determining whether information sought is redundant and thus, overly burdensome (id.). Respondents allege that Complainant's general and specific objections to the requested discovery constitute efforts by EPA to avoid the truth and prevent Respondents from being able to properly prepare a defense (Reply Brief in Support of Motion for Written Discovery and Depositions ("Reply"), dated June 8, 2007, at 2).

Turning to Specific Objections, Complainant objects to Interrogatories 10, 11, 12, 35 and 36 upon the ground that these seek information regarding EPA investigations of alleged corrupt activities and/or motives of New Castle County officials and are thus not probative of a disputed issue of material fact herein, nor relevant to liability or the relief sought as required by Consolidated Rule 22.19(e)(1)(iii) (Response at 8). Respondents have, however, alleged that this action was instituted in bad faith and that EPA is part of a conspiracy with the County (Reply at 3, 6). In support of this contention, Respondents have submitted CCR and Inspection Reports from an initial list of 16 other construction sites in New Castle County during the period November 1997 through August 2004 which exhibit the same sort of "unsatisfactory and/or noncompliant" site conditions as allegedly existed at the Christiana Town Center Site at issue here (R's Phx Exhs 50-65). Respondents allege that there are at least 29 other sites similarly situated and that EPA has admitted that it never pursued any enforcement efforts with respect to any of these 29 sites (Supplemental Identification of Hearing Exhibits, dated May 15, 2007; Reply Brief at 5, ¶¶ 11, 12). Any EPA admission in this respect is implicit and arises from the fact that it was only able to name one other proceeding involving storm water regulations in New Castle County during the relevant period and that was against the County in United States District Court.[17] Respondents, therefore, assert that evidence abounds in support of the theory that EPA has singled out the Respondents unlike dozens of other operators or owners similarly situated (Reply Brief at 5). Presumably, these 29 other sites include the 16 sites identified in Respondents' initial Prehearing Exchange and the 14 sites identified in Request for Admission 43, discussed infra. Although it is not clear that these sites may truly be said to be "similarly situated" to the Christiana Town Center Site at issue here, it is my conclusion that Respondents have prima facie made a case for discovery as to the selective enforcement defense. Respondents' specific Discovery requests will be viewed in the light of that conclusion.

Respondents assert that the second and last criterion necessary to make out a selective enforcement defense involves the question of whether this proceeding is being undertaken maliciously, in bad faith, for arbitrary reasons, or based upon constitutionally impermissible grounds (id.). Contrary to EPA's argument, Respondents say that it is not necessary for

[17] *United States of America v. New Castle County, Delaware, Delaware Department of Transportation, and the State of Delaware,* United States District Court for District of Delaware, Civil Action No.01-588. A copy of the complaint in that case is attached to the Response.

Respondents at [the discovery] stage of the proceeding to conclusively prove their defense. According to Respondents, it is only necessary to have adequately stated such a defense. Respondents allege that no evidence of environmental harm exists, point out that this matter has already been addressed by the County [Settlement Agreement of December 2005], and ask rhetorically why EPA is pursuing this pointless proceeding (Reply Brief at 4). Respondents speculate that something else must be going on behind the scenes to convince EPA to pursue this pointless proceeding. Although it will take evidence rather than mere allegations to establish that EPA is a part of, or privy to, an alleged conspiracy with the County against Respondents, Respondents have made out a prima facie basis for discovery of selective enforcement. Unlike County officials who were involved in politics and elections, EPA's incentive for bad faith enforcement action against Respondents appears limited to efforts to obtain favorable publicity as to enforcement of the CWA. Respondents contend that there is evidence aplenty that EPA is prosecuting Respondents for reasons proscribed by selective enforcement jurisprudence.[18] The mere fact that the County may have invited EPA's attention to the Site and that County employees may have participated in EPA inspections of the Site does not establish any impropriety. However, if Complainant investigated or was otherwise aware of bad faith activities of County officials with regard to enforcement of Water Regulations against Respondents and nevertheless singled Respondents out for enforcement, Respondents are entitled to discover those facts. As noted infra, Complainant relies on the testimony of County employees and CCR and Inspection Reports obtained from the County as evidence of Site conditions. Respondents allege that EPA has full knowledge that the only reason that the County was pursuing this matter was with an aim toward the illegal plot to harm Acierno and advance the political careers of high level County officials (Response, dated April 5, 2007, to March 6 [Prehearing] Order at 18). Additionally, Respondents allege that EPA knew as of the spring of 2004 that the Site was fully stabilized and presented no risk of environmental harm

Interrogatory 1 asks EPA to identify and describe all water samples taken from the Eagle Run stream during the March through May 2004 time period. While there does not appear to be any sampling requirement in connection with the Christiana Town Center Site, if such sampling were performed, it might be relevant to any contention there were excess sediment discharges from the Site to Eagle Run. Therefore, Complainant will be ordered to answer Interrogatory 1.

Interrogatory 2 asks for all reasons why the plan attached as Exhibit 1 to the Affidavit of Charles Schadel, dated April 23, 2004, submitted in support of the Application for an Administrative Warrant to the United States District Court for the District of Delaware, was relied upon for purposes of inspecting the Site. As indicated, supra note 12, the parties disagree as to whether this plan, signed by Frank Acierno on January 10, 2003, was approved by the County. Complainant contends that the plan was not approved. Respondents are being

[18] Reply Brief at 6, 7. Respondents assert that their information exchange includes a plethora of documents showing that:

a.) the County and the EPA prosecuted the Respondents in an attempt to gain favorable media coverage;
b.) the EPA would never have gotten involved with the Christiana Town Center Site, but for the urging of the County;
c.) the EPA conducted Site inspection in conjunction with the County;
d.) no articulable Site deficiencies existed before such inspections;
e.) the County and EPA singled Respondents out for enforcement; and
f.) the County did so for bad faith reasons.

permitted to take Mr. Schadel's deposition and he may be asked these questions when he is deposed or when he is examined at the hearing. This Interrogatory will be denied.

Interrogatories 3 and 4 ask for the identity of the person or persons who first contacted EPA regarding the Site that resulted in the investigation that began on or about February 2004 and to describe all conversations which took place resulting in the decision to contact counsel for Respondents in order to obtain access to the Site. Interrogatory 5 asks for the description and identity of all documents in EPA's possession at the time contact was made with counsel for Respondents on February 27, 2004, which caused it to seek permission to inspect the Site. These Interrogatories are unduly burdensome and will be denied.

Interrogatories 6 and 7 ask for a description of all written and verbal communications with any of the Respondents regarding the alleged need to obtain a new NPDES permit after September 14, 2003. Respondents allege that an admission by EPA that they never informed the Respondents that the NPDES permit had expired prior to the end of its five-year term would prove dispositive of EPA's averment to the contrary contained in the Amended Complaint (Reply Brief at 14, 15). Respondents assert "[o]f course that is relevant."[19] These Interrogatories request investigatory information which is not discoverable and, in addition, are unduly burdensome. Accordingly, these Interrogatories will be denied.

Interrogatory 8 asks for the identity of all paved roads EPA entered into in the course of its inspection [of the Site] on March 9, 2004, and Interrogatory 9 asks for the identity and description of all specific types and varieties of dirt, soil, fill, or the like which EPA saw being moved on the Site during the course of its inspection on May 4, 2004. Interrogatory 8 may be relevant to Respondent's contention the inspection on March 9 was the result of a trespass and thus illegal. Interrogatory 9 may be relevant to Respondents' contention the soil and gravel the inspectors allegedly saw being moved by a backhoe at the time of the Site inspection on May 4, 2004, was not a land disturbing activity. Complainant will be ordered to answer these Interrogatories.

Interrogatories 10, 11 and 12 ask for a description of efforts by EPA to investigate whether the County's contact with EPA regarding conditions at the Site was in furtherance of a plan to harm Frank Acierno, was in furtherance of a plan to advance the political or personal interests of any high-level County officials, and was part of high-level County officials' corrupt activities which were being investigated by the FBI and the United States Attorney's Office. Interrogatory 35 asks for a description of all investigations conducted by EPA respecting the reasons why the County tried to stop the Site from being fully stabilized during the course of extensive placing of straw and seeding efforts which were being undertaken in September of 2003. Interrogatory 36 asks for the identification of all persons with whom EPA spoke during any investigation described in response to paragraph 35. Complainant will be directed to answer Interrogatories 10, 11, 12, and 35. Interrogatory 36 will be denied as unduly burdensome, and lacking in significant probative value. In addition, it asks for information that is not discoverable.

[19] Id. 15 Paragraph 76 of the Amended Complaint alleges that the NPDES permit expired on September 14, 2003. EPA has, however, adopted the position that a permittee, who has submitted a valid NOI, is obligated to comply with the general permit notwithstanding that it may have expired (June Order at 4, note 4).

Interrogatory 13 asks for the identification of all individuals who inspected the Site on March 9, 2004, in conjunction with and on behalf of EPA; Interrogatory 14 asks for a description of the reasons persons other than EPA representatives inspected the Site on March 9, 2004; Interrogatory 15 asks for a description of the means by which other persons who accompanied EPA on its Site inspection on March 9, 2004, became aware of the inspection; Interrogatory 16 asks for the identification of all individuals who inspected the Site on May 4, 2004, in behalf of and in conjunction with EPA; Interrogatory 17 asks for all reasons why persons other than EPA representatives inspected the Site on May 4, 2004, and Interrogatory 18 asks for the means by which other persons who accompanied EPA on the May 4 Site inspection became aware of the inspection. Complainant will be ordered to answer Interrogatories 13 and 16. Interrogatories 14, 15, 17, and 18 will be denied as involving enforcement strategy not normally subject to discovery and as lacking in significant probative value.

Interrogatory 19 asks for a description of all reasons why EPA pursued an investigation of the Site despite the County having in its possession two CCR Reports from October 2003, which indicated that the erosion and control plan for the Site was fully implemented and that the Site was in full compliance with all requirements of the law; Interrogatory 20 asks for the reasons EPA pursued investigation of the Site beginning on or about February of 2004 in spite of the fact that sworn deposition statements given on November 19, 2003, by the County's Chief Site Inspector, Doug [Stephen D.] Hokuf, failed to indicate that there were any violations on the Site; and Interrogatories 21 and 22 ask for the identification and description of all deposition transcripts and CCR Reports concerning Site conditions reviewed by EPA and all research regarding pending litigation between the County and Christiana Town Center, LLC with respect to erosion and sediment control conditions, conducted by EPA prior to deciding to investigate the Site. These Interrogatories concern matters of enforcement discretion and strategy not normally discoverable. Moreover, as noted supra, Respondents have embellished the October CCR Reports and Mr. Hokuf's deposition testimony as neither the Reports nor the deposition support Respondents' contention that in October of 2003 the Erosion and Sediment Control Plan was fully implemented. In any event, the Agency's case will stand or fall on evidence as to Site conditions produced at the hearing and evidence in its possession at any particular prior time is neither probative nor relevant. These Interrogatories will be denied.

Interrogatory 23 asks for the identity of the person or persons at EPA who received a communication which caused EPA to become interested in the condition of the Site, ultimately resulting in the investigation of the Site commenced in or about February of 2004. Interrogatory 24 asks for reasons EPA failed to notify counsel for Respondents of the intent to seek an Administrative Search Warrant despite being requested to do so in a letter from Respondents' counsel received by EPA on or about March 8, 2004. Interrogatory No. 25 asks EPA to identify all persons involved in making the decision not to notify Respondents prior to seeking an Administrative Search Warrant. Complainant objects to these interrogatories, for the reason, among others, that they do not inquire into any relevant and probative area of inquiry and are unreasonably burdensome. Complainant points out that, as recognized by the United States District Court which issued the Administrative Search Warrant, applications for search warrants whether administrative or criminal are normally ex parte. In addition to contending that Interrogatory 25 concerns enforcement strategy [not subject to discovery], Complainant says that Interrogatory 25 infringes on the attorney-client privilege and the deliberative process privilege (id.). These Interrogatories will be denied for the reasons stated.

Interrogatory 26 asks for the description of all facts supporting EPA's contention that a forebay needed to be in place in the stormwater basin at the time of the Site inspection conducted on May 4, 2004, and Interrogatory 27 asks for the identity of all persons who provided any information in support of the contention referenced in paragraph 26. Whether there is a requirement for a forebay when a Site is inactive, or largely so, is a disputed issue and Complainant will be ordered to answer Interrogatories 26 and 27 to the extent these questions are not answered in Complainant's Prehearing Exchange.

Interrogatory 28 asks for a description of information supporting the contention contained in the Complaint that there was no County approved Erosion and Control plan for the Site in 2003, and Interrogatory 29 asks for the identity of all persons who provided EPA with the information in support of the contention referenced in paragraph 28. Interrogatory 30 asks for a description of all facts which support the contention contained in the Complaint that the Site was not fully stabilized at various times in 2002, and Interrogatories 31 and 33 ask for the identity of all time periods during 2002 and 2003 that EPA contends that the Site was not stabilized in accordance with the Delaware Sediment & Stormwater Regulations. Interrogatory 32 asks for a description of all facts which support the contention contained in the Complaint that the Site was not fully stabilized at various times in 2003. Complainant will be ordered to answer Interrogatories 28 through 33 to the extent these questions are not answered in Complainant's Prehearing Exchange.

Interrogatory 34 asks for the identification of all means by which EPA contends that the Site could have been stabilized in January 2003, in spite of the fact that there were below freezing temperatures, frozen soil conditions and snow-encrusted groundcover during that entire month. This Interrogatory will be denied as information as to Site conditions is not information most reasonably obtained from Complainant as the non-moving party. Interrogatory 35 asks for a description of all investigations conducted by EPA with respect to the reasons why the County tried to stop the Site from being fully stabilized during the course of extensive placing of straw and seeding efforts which were being undertaken in September of 2003, and Interrogatory 36 asks for the identity of all persons with whom EPA spoke in the course of any investigation described in response to paragraph 35. Complainant will be ordered to answer Interrogatory 35. Interrogatory 36 will, however, be denied as unduly burdensome and involving investigatory information not normally subject to discovery.

Interrogatory 37 asks for the identity of all civil penalty proceedings brought by EPA pursuant to the NPDE S provisions of the CWA regarding any construction site located in the unincorporated area of New Castle County from January 1, 2001, to the present (other than this proceeding), and Interrogatory 38 asks for a description of the nature of the allegations and the outcome of any proceedings identified in response to Interrogatory 37. Interrogatory 39 asks for the identity of any investigations of construction sites regarding compliance with NPDES provisions of the CWA conducted from January 1, 2001, to the present regarding any site located in the unincorporated area of New Castle County, and Interrogatory 40 asks for the nature and description of any investigation identified in response to paragraph 39. Interrogatory 41 asks for the identity and description of any Administrative Search Warrant applications made with respect to a construction site's compliance with NPDES provisions of the CWA from January 1, 2001, to the present, regarding a site in the unincorporated area of New Castle County, and Interrogatory 42 asks for a description of any Administrative Search Warrant applications, and any investigations or proceedings based thereon, described in response to paragraph 41.

Interrogatory 43 asks for a description of any other type of EPA administrative proceedings or efforts to obtain monetary fines or penalties against the owner of a construction site located in the unincorporated area of New Castle County from January 1, 2001, to the present based upon alleged violations of the NPDES provisions of the CWA. Complainant says these Interrogatories should be denied as burdensome and non-probative. Additionally, Complainant contends that an inquiry into enforcement actions in New Castle County alone, in addition to being unreasonably burdensome, is misleading and not probative. Complainant points out that EPA Region 3 is responsible for [enforcement of the CWA] in the District of Columbia, Delaware, Maryland, Pennsylvania, Virginia, and West Virginia, of which New Castle County is a very small part. Complainant's arguments are rejected because Respondents have made out a prima facie case for discovery on their selective enforcement defense and because there is some evidence that New Castle County officials had a vindictive intent and attitude against Respondents' counsel, Richard L. Abbott, Esq. and his clients.[20] While it is recognized that enforcement action in this case has been undertaken by EPA rather than the County and that it has been held that the involvement of a separate sovereign in a prosecution tends to negate a vindictive prosecution claim,[21] this obviously is fact dependent.[22] Respondents will be given an opportunity to establish their selective or vindictive enforcement action defense. Complainant will be ordered to answer these Interrogatories.

Interrogatory 44 asks for a description of all facts that Charles Adam Schadel intends to testify to at the hearing in this proceeding, and Interrogatory 45 asks for a description of all facts that any other EPA witness intends to testify to at the hearing in this proceeding. Interrogatory

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[20] See, e.g., a copy of a letter from the United States Attorney for the District of Delaware to United Sates District Judge John P. Fullam, dated August 8, 2005, concerning the upcoming criminal trial of the former County Executive, and the County's former Chief Administrative Officer, *United States v Thomas P. Gordon, et al.*, Criminal Action No.04-63 (JFPP), from which it appears that the County Executive expressed an intent to ruin the career of Richard L. Abbott, Respondents' counsel, by having the Department of Land Use delay future consideration and approval of matters pending before the Department by Abbott's clients (Order Granting in Part and Denying in Part Complainant's Motion to Strike, dated February 28, 2007, note 11).

[21] See, e.g., *United States v. Schoolcraft,* 879 F. 2d 64 (3d Cir 1989) (where alleged vindictiveness was that of State district attorney, but actual prosecution was by U.S. attorney, the court rejected a vindictive prosecution defense, stating "the role of a separate sovereign in bringing charges against a defendant minimizes the likelihood of prosecutorial abuse. Indeed, the involvement of a separate sovereign tends to negate a vindictive prosecution claim." 879 F. 2nd at 65).

[22] Among several individuals identified as proposed witnesses for both Complainant and Respondents is Mr. Stephen D. Hokuf, Jr., who has been referred to supra as Chief Site Inspector for the County and who is identified in Respondents' summary of his proposed testimony as an engineer in training employed by the County in 2003. The summary of his anticipated testimony is to the effect that he was assigned to make sure that the Site was inspected every single day of every single week during the calendar year 2003 and that he was instructed to apply oversight and inspection standards the likes of which the County had never applied before or since. He was instructed that either he or someone else had to visit the Site every day to analyze the condition of the Site and hopefully find some deficiency that could be documented, reported, and hopefully form the basis of some violation. These instructions allegedly came from George O. Haggerty, Assistant General Manager of the County's Land Use Department. Mr. Hokuf is also expected to testify that he found an Erosion and Sediment Control Plan submitted for the Site in January 2003 to be satisfactory, but that he later was asked to issue a letter finding it to be unsatisfactory at the behest of Mr. Haggerty. Respondents have identified another witness, who is also listed as a witness for Complainant, County employee, John Connell. Mr. Connell is expected to testify, among other things, that he was instructed to inspect the Site when Mr. Hokuf was unavailable and that there was never another construction site at which he was asked to perform inspections with such frequency and high degree of scrutiny.

46 asks, with respect to any expert witness whose testimony EPA intends to present at the hearing in this proceeding, for a description of all opinions that he or she will give in testimony, the factual basis for any opinions to which the expert intends to testify, and the education, training, and experience which EPA contends qualifies the witness as an expert. These questions are answered or substantially so in Complainant's Prehearing Exchange and these Interrogatories will be denied as duplicative and burdensome. Moreover, as indicated infra, Respondents will be permitted to take Mr. Schadel's deposition.

Complainant argues that Respondents are not entitled to any discovery on their selective prosecution [enforcement] theory [defense]. This is in accordance with the settled rule that for discovery to be allowed in support of such a theory, a preliminary showing of such a defense must first be made (supra at 6). This requires (1) proof [evidence] that a particular violator was singled out for enforcement or prosecution while other violators similarly situated were left untouched [no prosecution or enforcement action being taken] and (2) that the selection was based on impermissible considerations such as race, religion, or the desire to prevent the exercise of constitutional rights. This rule is equally applicable in the administrative or civil context. See, e.g., *In re B&R Oil Company*, 8 E.A.D. 39, 51 (EAB, 1998); and *Aakash Chemicals & Dystuffs, Inc.*, EPA Docket No. 5-TSCA-96-006, 1997 EPA ALJ LEXIS 44 (November 4, 1997). Moreover, Complainant states that Respondents' selective enforcement defense lacks merit and cannot be established (Response at 4). Complainant alleges that it can demonstrate that it has initiated storm water enforcement actions nationally, throughout EPA Region 3 and in the State of Delaware. In support, Complainant points to the 2000 Industrial Storm Water Enforcement Strategy, located at the following internet address (http://www.epa.gov/compliance/resources/policies/civil/cwa/stmwtrsta.pdf.). In furtherance of this National Storm Water Enforcement Strategy, Complainant says that it has commenced and settled an action against New Castle County, the very person with whom Respondents allege EPA has conspired against them, in the United States District Court for the District of Delaware,[23] in connection with its separate municipal storm sewer system ("MS4"). Complainant also states that it has commenced and settled an administrative action against another construction company for storm water violations in Sussex County, Delaware (*Fairfield at Longneck*, EPA Docket No. CWA-03-2005-0383) and attached a copy of the complaint in that case (Response at 4). Respondents point out that Complainant has not cited any legal authority for the proposition that a program on paper can trump what it actually does in practice (Reply Brief at 9, ¶ 23). Complainant's arguments miss the point because it has been determined supra that Respondents have made out a prima facie case that they have been singled out for enforcement by the County among others apparently similarly situated and submitted some evidence from which vindictive or selective enforcement could be inferred. Complainant, of necessity, is relying on evidence obtained from the County as to the alleged violations and may not ignore the likelihood that its evidence is the product of selective enforcement (note 22, supra). In this regard, Respondents allege that the County fed EPA false information and that EPA acted upon it even after becoming aware of its falsity (Response to March 6 Order, at 14, ¶ 5). Although this latter assertion has not been established, it is concluded that Respondents are entitled to the additional discovery ordered herein on their selective enforcement defense.

[23] *U.S .v .New Castle County, Delaware and the Delaware Department of Transportation*, Civil No 01-586 (D. Delaware). A copy of the Complaint in that case is attached to Complainant's Response.

5. ADMISSIONS

Admission 1 asks EPA to admit that EPA's investigation of the Christiana Town Center Site in or about 2004 was based upon contact from the New Castle County government ("County"). While this Admission would normally be denied as not relevant or probative, under the circumstances present here, Complainant will be ordered to answer this Request.

Admission 2 asks EPA to admit that the lack of a forebay, which Complainant contends is a violation of the CWA, is not required after land disturbing activities are completed, a property is stabilized, and the erosion and control plan is fully implemented. Admission 2 will be denied as involving a legal conclusion rather than facts. Moreover, Respondents' contention that land disturbing activities had been completed at the Site, the Site was fully stabilized and the Erosion and Sediment Control Plan fully implemented at the time of the March 9 inspection has not been established and is a matter for evidence at the hearing. It is noted that the Amended Complaint alleges that an NCCDLU employee saw construction activity taking place at the Site on September 1, 2004 (id. ¶ 74).

Admission 3, which asks EPA to admit that the pipes which were allegedly stored on the Site at the time of the Schadel inspection on March 9, 2004, shown in photos taken by him and referred to in his Affidavit, are not shown as proposed for future installation on any plan for the Site. Respondents assert that storing concrete drainpipe on a site means nothing other than it is stored for purposes of use somewhere and that is illogical to assume that it means anything about ongoing land disturbing activities (Response to March 6 Order at 13, ¶ 3). Admission 3 will be denied as information not most reasonably obtained from Complainant as the non-moving party, because Respondents, not Complainant, should be more familiar with Site plans.

Reiterating the alleged falsity of the Schadel Affidavit, Respondents allege that it is not unusual coming out of a harsh winter that a few isolated areas of a site would be sparsely vegetated. Admission 4 asks EPA to admit that the discharge of sediment as alleged in paragraph 4 of the Schadel Affidavit is not in and of itself a violation of the Delaware Sediment and Stormwater Regulations; Admission 5 asks EPA to admit that neither EPA nor Charles Schadel conducted any scientific testing to support the conclusory statement that there was "significant sediment discharge from the site to Eagle Run" on the date of the Site inspection conducted on March 9, 2004, as averred in paragraph 6 of the Schadel Affidavit. Admission 6 asks EPA to admit that in order to observe the stormwater basin as referenced in paragraph 4a of the Schadel Affidavit, Mr. Schadel entered a roadbed adjacent to the basin. Admission 4 will be denied as involving a legal conclusion and Complainant will be ordered to answer Admissions 5 and 6.

Complainant specifically objects to specified Admission, e.g., Admission 7, which asks Complainant to admit that but for the Schadel Affidavit, EPA would not have filed the Ex Parte Application for Administrative Warrant with the United States District Court for the District of Delaware. Complainant argues that this Request does not inquire into any relevant and probative area of inquiry and is speculative and hypothetical (Response at 9). This argument is considered to be sound and Admission 7 will be denied for the reason stated.

Requests for Admission 17 and 18 asks Complainant to admit that the December 20, 2002 Show Cause Decision referenced in paragraph 45 of the Complaint does not expressly state that the approved April 2002 sediment and emission control plan was revoked, but does state that a November 2002 erosion and sediment control plan had been reviewed and would be approved

upon submission of a fully executed plan. Request for Admission 19 asks Complainant to admit that the January 30, 2003 Show Cause Decision alleged that there was no approved Erosion and Sediment Control Plan for the Site at that time. Complainant objects to these requests, saying they ask Complainant to admit or deny the content of documents which "speak for themselves" (id.). Again, this argument is considered to be sound and Admissions 17,18, and 19 will be denied for the reason stated.

Complainant says that Admission 25, which asks Complainant to admit that the County falsely alleged that it did not approve the November 2002 erosion and sediment control plan as alleged in paragraph 52 of the Complaint (Amended Complaint, ¶ 59) is objectionable because it relates to actions of New Castle County rather than EPA. Additionally, Complainant asserts that this Admission does not inquire into any relevant and probative area of inquiry and is unreasonably burdensome. Admission 25 will be denied.

Complainant contends that Admissions 30, 31, 32, 33, 34, 35, 43, 44, 45, 46, and 48 are all premised on Respondents' selective enforcement theory [defense] and are improper, because Respondents have not made the necessary preliminary showing of selective or discriminatory enforcement. It has, however, been determined supra that Respondents have made a prima facie case for discovery on their selective enforcement defense based on CCR and Inspection Reports showing noncompliant and unsatisfactory site conditions at numerous other sites apparently located in New Castle County for which no enforcement action was taken. It has also been determined that there is a basis for an inference that the actions of the County as to Mr. Acierno were vindictive. Admission 30 asks EPA to admit that, other than Respondents, EPA has never prosecuted or charged owners of property located in unincorporated New Castle County from January 1, 2001, to the present for NPDES violations for construction activities based upon CCR Reports showing "non-compliant" and/or "unsatisfactory" site conditions in New Castle County. Complainant will be ordered to answer Admission 30.

Admission 31 asks EPA to admit that but for the contact by the County, EPA would never have investigated the Site; Admission 32 asks EPA to admit that EPA was made aware before it ever inspected the Site, that the County had undertaken a years-long practice of harassment of Frank Acierno for unlawful purposes; Admission 33 asks EPA admit that the former County Executive and the former County Chief Administrative Officer are currently under federal indictment for racketeering and fraud related to their alleged abuse of office for their own personal gain; Admission 34 asks EPA to admit that EPA never performed any investigation as to whether the contact by the County with respect to the Site was intended to further the County's practice of harassment of Mr. Acierno; and Admission 35 asks EPA to admit that it was made aware before inspecting the Site that it was being utilized as a pawn in the County's scheme to harass Mr. Acierno. Admissions 31, 32, 34, and 35 will be denied as involving speculation and conjecture, and Admission 33 will be denied as information not most reasonably obtained from Complainant as the nonmoving party.

Admissions 8, 9, and 10 concern EPA's delegation of authority to inspect and enforce EPA NPDES regulations under the CWA. Admission 8 asking Complainant to admit that from January 1, 2001, to the present the EPA has delegated its authority to regulate and enforce the NPDES provisions of the CWA to the Delaware Department of Natural Resources and Environment Control ("DNREC"); Admission 9 asks EPA to admit that from January 1, 2001, to the present, DNREC has effectively delegated its NPDES authority as delegee [delegatee] of the

EPA to the County; and Admission 10 asks EPA to admit that the County has effectively delegated the authority to inspect properties for NPDES compliance pursuant to the framework of the Delaware Water Pollution Regulations and the Water Regulations. These Admissions will be denied because they involve legal conclusions. Moreover, as stated they are overly broad, implying that because of the delegations neither EPA nor DNREC retained NPDES enforcement authority. This contention is erroneous and is rejected. See June Order at 20 as to EPA retaining enforcement authority and DSS Regs 14.4 and 14.5 as to DNREC.

Admission 11 asks Complainant to admit that as long as a property conformed with the Water Regulations in the years 2001 through 2003, the property was therefore also in full compliance with the NPDES provisions of the CWA. Admission 12 asks EPA to admit that the Notice of Intent referenced in paragraph 29 of the Complaint was submitted by Acierno as "Owner/ Developer" and Admission 13 asks EPA to admit that the Notice of Intent referenced in paragraph 29 of the Complaint was submitted for the Site, and not for any individual or entity. Admission 14 asks EPA to admit that, in 2002 and 2003, a construction site was *ipso facto* in conformance with all NPDES requirements under the CWA, if an erosion and sediment control plan was approved by the County and complied with; Admission 15 asks EPA to admit that at all times relevant to this action, there was a County approved erosion and sediment control plan for the Site; and Admission 16 asks EPA to admit that, in conformance with the March 2, 2002 Show Cause Decision referenced in paragraphs 38 and 39 of the Complaint, a new Erosion and Sediment Control Plan was timely submitted for the Site and approved by the County. Admissions 11, 12, and 14 will be denied as involving legal conclusions and Admissions 13, 15, and 16 will be denied as information not most reasonably obtained from Complainant as the non-moving party.

Admission 43 asks EPA to admit that it had never taken enforcement action for NPDES violations as to 14 identified sites [apparently located in New Castle County]; Admission 44 asks EPA to admit that, other than with respect to the Site, EPA was not contacted by the County regarding alleged NPDES violations at a site during the years 1998 through 2006; Admission 45 asks EPA to admit that it was not contacted by DNREC regarding alleged NPDES violations for a property located in the County's jurisdiction during the years 1998 through 2006; Admission 46 asks EPA to admit that its investigation of Site conditions which gave rise to this proceeding was not based on any contact or referral by or from DNREC; Admission 47 asks EPA to admit that DNREC did not accompany EPA on inspections of the Site on March 9, 2004, or May 4, 2004; Admission 48 asks EPA to admit that DNREC refused to take over regulatory and inspection oversight from the County after being requested to do so by Mr. Acierno and his counsel, based upon the contention the County was abusing its delegated legal authority under the Water Regulations. Admissions 43, 44, and 45, will be denied as unreasonably burdensome and Admission 48 will be denied as not asking for information most reasonably obtained from Complainant. Complainant will be ordered to answer Admissions 46 and 47.

Admission 49 asks EPA to admit that the assertion contained in paragraph 55 of the Complaint (Amended Complaint, ¶ 63) that CCR Reports are intended to detail violations of the [E&S Control] Plan is inaccurate; Admission 50 asks EPA to admit that CCR Reports are intended to document site conditions relative to the erosion and sediment control measures which are shown on the approved Erosion and Control Plan; Admission 51 asks EPA to admit that the references [to Site conditions] as in "non-compliance" and "unsatisfactory" contained in the CCR Reports referred to in paragraph 57 of the Complaint (Amended Complaint ¶ 65), do not

constitute a determination that there is any violation of the Water Regulations; Admission 52 asks EPA to admit that there was no soil being moved at the time of the May 4, 2004, Site inspection as alleged in paragraph 59 of the Complaint (Amended Complaint, ¶ 67); Admission 53 asks EPA to admit that the "dirt" alleged to have been moved by a backhoe during the course of the EPA Site inspection on May 4, 2004, as alleged in paragraphs 58 and 59 of the Complaint (Amended Complaint, ¶¶ 66 and 67), was not piles of dirt; Admission 54 asks EPA to admit that the "dirt" alleged to have been moved during the course of the May 4 Site inspection by EPA was particulates which might be contained within or upon the crusher-run stone or "gravel" which was being moved. These Admissions will be denied as involving legal conclusions or as involving information not most reasonably obtained from Complainant.

Admission 55 asked EPA to admit that the discharge of sediment as alleged in paragraph 62 of the Complaint (Amended Complaint, ¶ 70) is not a prohibited by the Water Regulations; Admissions 56, 57, 58 and 59 ask EPA to admit that there was no need for the stormwater basin at the Site to contain a forebay, if the Site's Sediment and Erosion Control Plan had already been fully implemented; that the submission of CCR Reports to the County was not required [during the period] May through September 2004, if the Site's Erosion and Sediment Control Plan had already been fully implemented; that the general permit for the Site did not expire on September 14, 2003, as alleged in paragraph 58 of the Complaint (Amended Complaint, ¶ 76), and to admit that the NPDES general permit for the Site did not expire until the conclusion of its five-year term on November 17, 2003. These Admissions will be denied as requiring the drawing of legal conclusions or as information not most reasonably obtained from EPA as the non-moving party. Moreover, as indicated supra, the evidence in the record does not establish that the E&S Control Plan or Plans for the Site had been fully implemented at the time of the EPA inspections of the Site in 2004.

Admission 60 asks EPA to admit that neither EPA, DNREC, or the County ever informed any of the Respondents that it was necessary to obtain a new NPDES permit before November 17, 2003; Admissions 61 and 62 ask EPA to admit that the Erosion and Sediment Control Plans for the Site, dated November and April 2002, did not contain any topographical lines that would indicate there was a difference in elevations in the pond; Admission 63 asks EPA to admit that the County and CCR's inspected the Site dozens of times in 2002 and 2003 but never indicated that the stormwater pond was not in compliance with the purported forebay requirement of the Erosion and Sediment Control Plan; Admission 64 asks EPA to admit that, if the approved Erosion and Sediment Control Plan for the Site did not contain a forebay, that [then] no forebay needed to be installed in the stormwater basin; Admission 65 asks EPA to admit that the only allegation [of violation] contained in Count I of the Complaint is the supposed failure to stabilize the Site from April 2002 to December 2002; Admission 66 asks EPA to admit that the only allegations contained in Count II of the Complaint are: 1) no approved Erosion and Sediment Control Plan for the Site after February 7, 2003; 2) the Site was not stabilized in 2003; and 3) no forebay was in the stormwater pond from January of 2003 on; Admission 67 asks EPA to admit that it has no evidence of whether a forebay existed in the stormwater basin during the year 2003; Admission 68 asks EPA to admit that the general allegations contained in Counts I and II of the Complaint, filed September 29, 2005, which averred that Respondents failed to "implement other requirements of the [plans from April 2002 and January 2003]" were never explained or specified by the EPA prior to April 9, 2007; and Admission 69 asks EPA to admit that it [has] never verified or sworn to the accuracy of any Complaint filed in this proceeding. These Admissions will be denied as involving legal conclusions, as information not reasonably

obtained from EPA, as information in documents that speak for themselves, and as not relevant or probative.

6. Respondents' Motion For Depositions Upon Oral Questions

By a letter addressed to Complainant's counsel, dated April 10, 2007, counsel for Respondents identified four County employees, four EPA employees, and one employee of the DNREC whom counsel stated it was necessary to depose. A tenth witness or category of witnesses whom counsel stated needed to be deposed were identified as "[a]ny other witness whom Complainant intends to call to testify or whom is permitted to testify by Affidavit or other written submission." The letter further stated that counsel would need documents evidencing the EPA's enforcement proceedings over the past seven years with respect to all sites in New Castle County and that formal discovery requests would be forthcoming.

Under date of April 19, 2007, Respondents submitted a formal Motion for Depositions Upon Oral Questions and for the issuance of subpoenas to non-party deposition witnesses. The Motion identifies four County employees, one DNREC employee and four EPA employees all of whom have been designated as hearing witnesses by the EPA.[24] In support of the Motion, Respondents point out that Rule 22.19 authorizes the taking of additional discovery and that in accordance with Rule 22.19(e)(3) such discovery includes "depositions upon oral questions" (Motion,¶ 1). Respondents further point out that, although some of the numerous proposed witnesses listed in Complainant's Prehearing Exchange have been deposed in other litigation concerning the subject matter of their proposed testimony, numerous others have not.[25] Respondents allege that each of Complainant's proposed witnesses has unique, individualized information and that EPA has only disclosed the general nature of each witnesses' proposed testimony without describing specific details (id., ¶¶ 3, 4). Respondents argue that judicial economy and efficiency militate strongly in favor of depositions being taken prior to the hearing, asserting that otherwise the hearing would need to be significantly extended by the longer time necessary for cross-examination. Respondents assert that because no hearing date has been set, the taking of depositions will not [unreasonably] delay the proceeding (id., ¶ 6). Additionally, Respondents say that the taking of depositions will not unreasonably burden EPA, pointing out that EPA initiated the proceeding and decided to call a voluminous number of witnesses. Respondents further say that EPA should not now be heard to complain that it is necessary for Respondents to take depositions. Respondents contend that depositions are essential for Respondents to be accorded due process rights to a fair hearing (id., ¶ 7). The problem with these arguments is that there is no constitutional right to discovery by deposition, or indeed any discovery,[26] and the Consolidated Rules of Practice are not hospitable to discovery by

[24] Although the body of the Motion states that Respondents wish to depose three EPA employees, four are identified: in the proposed Order: Chad Harsh, Andrew Dinsmore, Charles Schadel, and Kevin Magerr.

[25] The deposition testimony of several County employees and employees of contractors for Respondents have been included in Respondents' Prehearing Exchange as proposed exhibits.

[26] Parties in administrative hearings do not have a constitutional right to take depositions, or indeed any discovery, absent a showing of prejudice or a showing that the refusal to permit depositions [discovery] would deny a party due process (*In re: Chippewa Hazardous Waste, Remediation & Energy, Inc*., 12 E.A.D. 346 at 368, CAA Appeal No. 04-02, 2005 EPA App. LEXIS 18, *58 (EAB, Sept. 30, 2005) (citing *McClelland v. Andrus*, 606 F.2d 1278, 1286 (D.C. Cir. 1979); *Silverman v. Commodity Futures Trading Comm'n*, 549 F.2d 28, 33 (7th Cir. 1977).

deposition. (*Clarke Environmental Mosquito Management, Inc.*, Docket No. FIFRA 02-2005-5203 (September 29, 2005).

Opposing the Motion, Complainant states that Respondents have not set forth adequate grounds for the taking of oral depositions as required by Consolidated Rule 22.19(e)(1) and (3) (Reply [Response] to Respondents' Motion for Discovery at 5). Complainant points out that in addition to the requirements for "Other discovery" set forth in Rule 22.19(e)(1) (supra note 1), Rule 22.19(e)(3) contains two additional, actually alternate, requirements for the taking of oral depositions as follows:

(i) The information sought cannot reasonably be obtained by alternative methods of discovery; or

(ii) There is a substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at a hearing.

Complainant contends that the proposed depositions should be denied because Respondents have not demonstrated that the information sought has significant probative value on a disputed issue of material fact relevant to liability or the relief sought, the proposed depositions should be denied because the information sought to the extent it is discoverable can reasonably be obtained by alternative methods of discovery and there is no reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing.

Conceding that it has objected to Respondents' Interrogatories and Requests for Admission for the reasons stated, Complainant contends that these discovery tools are much less burdensome and more acceptable alternatives to oral depositions (Response at 6). Complainant says that to the extent that Respondents seek relevant and probative evidence which is in the possession of Complainant, EPA would endeavor to voluntarily supply the requested evidence to Respondents. Complainant notes that Respondents have submitted a FOIA request to which the Agency was then preparing a response and that that information together with the information in its Prehearing Exchange and information to be produced in response to Respondents' Interrogatories and Requests for Admission should be more than adequate to enable Respondents to prepare for the hearing thus obviating the need for oral depositions. This Response appears hypocritical inasmuch as Complainant has objected to all of Respondents' Interrogatories and Requests for Admission. Be that as it may, Complainant has been ordered to answer certain of the Interrogatories and Requests for Admission and this information together with Complainant's Prehearing Exchange and the deposition of Mr. Schadel authorized herein should enable Respondents to adequately prepare for the hearing.

Complainant points out that it does not employ the New Castle County employees or the State of Delaware employee Respondents seek to depose and that, accordingly, EPA is not the source of the desired information. Moreover, Complainant contends that the actions of State of Delaware and New Castle County employees are not relevant to Respondents' selective enforcement defense and that, even it is proven that State of Delaware and New Castle County employees acted in an improper or illegal manner, this has no bearing on this case. According to Complainant, the only thing that is relevant is the actions of EPA employees who allegedly acted in a lawful and appropriate manner (id. 7). This argument overlooks the fact that Complainant's

evidence as to Site conditions is dependent on evidence from the County, i.e., proposed testimony of County employees, photographs and documents such as Inspection and CCR Reports. As noted supra, Respondents allege that the County fed EPA false information apparently as to whether there were ongoing land disturbing activities at the Site and that EPA acted upon the information even after becoming aware of its falsity.

Under date of June 8, 2007, Respondents submitted a Reply Brief in support of their Motion for Written Discovery and Depositions. The Interrogatories and Requests for Admission have been Granted in Part and Denied in Part, supra, and it is only necessary to consider Respondents' Motion for Depositions Upon Oral Questions. This Motion asks for an Order permitting the taking of the depositions of nine of Complainant's proposed witnesses, that is, one DNREC employee, four County employees and four EPA employees. Respondents emphasize that they are not asking for depositions of EPA witnesses who have been deposed in other litigation and argue that depositions are necessary to enable them to pursue a Motion *in Limine* to narrow the scope of the hearing (Reply Brief at 10, ¶ 28). As indicated hereinafter, Respondents will be permitted to take the deposition of EPA employee, Mr. Charles Schadel. The Motion for the taking of the depositions of the other proposed EPA witnesses have not been shown to meet the requirements of the Rule for taking depositions and will be denied.

Discussion

In support of their Motion for Oral Depositions, Respondents assert that EPA knows full-well that it is not reasonably possible to drill down to the essence of a proposed hearing witnesses' justification for an opinion or finding without posing questions in person to that witness (Reply Brief at 11, ¶ 30). Additionally, Respondents state that once a witness is presented at the hearing, it is unlikely that the ALJ will strike testimony or entertain a Motion in Limine to excise or disallow testimony. Therefore, Respondents argue that the only way to permit Respondents to present their defenses and adequately litigate this proceeding is to permit the depositions of EPA's intended hearing witnesses (id.). Respondents maintain that there is no other means by which such information can reasonably be obtained.

It is clear that Mr. Schadel is a very important witness and central actor in this proceeding. He conducted the inspections of the Site on March 9 and May 4, 2004, he executed the Affidavit which was the basis for the Administrative Warrant issued by the United States District Court and the May 4 inspection, he used a mathematical model to determine the number of discharges from the Site, he developed the proposed penalty, and executed the Certificate of Service by which the Complaint was served on Respondents. The simple fact is that Interrogatories are easily evaded and are not an effective manner of dealing with matters of veracity and credibility. Moreover, this proceeding has been pending for almost two and one-half years with no hearing date having been set and it is concluded that the taking of Mr. Schadel's deposition will hasten the ultimate resolution of this protracted proceeding. Respondents will be permitted to take the deposition of Mr. Charles Schadel subject to the limitations listed below. Permitting the depositions of the other EPA witnesses as requested by Respondents would mean that depositions would become the normal discovery tool rather than the exception under Rule 22.19(e), which is clearly not contemplated by the Rule. Respondents' Motion for Depositions of EPA witnesses other than Mr. Schadel will be denied.

ORDER

1. Complainant's Motion for Discovery is GRANTED in Part and DENIED in Part as indicated above.

2. Respondents shall furnish the information and documents including photos, as to which Complainant's Motion has been granted within 30 days of the date of this Order.

3. Respondents' Motions to Dismiss and for a *Franks* Hearing are DENIED.

4. Respondents' Motions for Oral Argument on its Motions to Dismiss and For a Franks Hearing are DENIED.

5. Respondents' Motion for Discovery by Written Interrogatory Questions, Document Requests and Requests for Admission is GRANTED in PART and DENIED in PART as indicated above. Complainant shall furnish the information and documents as to which Respondents' Motions have been granted within 30 days of the date of this Order.

6. Respondents' Motion for Depositions upon Oral Questions is GRANTED as to Mr. Charles Schadel and otherwise DENIED. Arrangements for the taking of Mr. Schadel's Deposition shall be made and the Deposition concluded within 30 days of the date of this Order. Unless the parties otherwise agree, the Deposition shall not exceed four hours in length.

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So Ordered

Dated this ____15th_____day of February, 2008.

_____

Spencer T. Nissen
United States Administrative Law Judge